Dec 8. Affirmed. Nelson

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SUPREME COURT OF THE UNITED STATES.

No. ~~185~~. 3

THE UNITED STATES, PL'FFS IN ER.,

vs.

JAMES McMASTERS AND RICHARD A. STEWART.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE EASTERN DISTRICT OF LOUISIANA.

G. S. GIDEON, Printer, No. 511 Ninth street, Washington, D. C.

SUPREME COURT OF THE UNITED STATES.

No. 165.

THE UNITED STATES, PL'FFS IN ER.,

vs.

JAMES McMASTERS AND RICHARD A. STEWART.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE EASTERN DISTRICT OF LOUISIANA.

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Gideon, Printer.

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Circuit Court of the United States, fifth circuit and eastern district of Louisiana.

UNITED STATES vs. JAMES MCMASTER. } No. 2,061.

Petition.—Filed 20th November, 1851.

UNITED STATES OF AMERICA,
Eastern District of Louisiana.

To the honorable the Circuit Court of the United States for the eastern district of Louisiana:

The petition of the United States of America, by their attorney, Logan Hunton, respectfully shows:

That by virtue of the treaty of cession of the province of Louisiana by the republic of France to the United States they became and now are the lawful owners and entitled to the possession of a certain tract or parcel of land situate in the parish of St. Bernard, in the district aforesaid, about ten miles below the city of New Orleans, between the river Mississippi and Lake Borgne, being the same tract of land on which Tower Desprez now stands, and according to the plat hereto annexed being the land in sections 25, township 13, range 13 east, and section 37, township 13, range 14 east, included between the line marked on said map, "upper line according to survey and possession," and the line marked "upper line according to the opinion of the Attorney General."

Petitioner further shows, that James McMaster, who resides in said parish, is in the actual possession of said tract of land.

Wherefore petitioner prays that the said James McMaster be cited to appear and answer this petition; and after due proceedings, that they have judgment for said tract of land and for recovery of the same, and that they have judgment for one thousand dollars, damages and costs; and they pray for all proper order and decrees.

(Signed) LOGAN HUNTON,
United States Attorney.

[*For Map see original, page* 3.]

Answer of McMasters.—Filed 3d Dec'r, 1851.

Circuit Court of the United States for the eastern district of Louisiana.

UNITED STATES
vs.
JAMES McMASTER.

James McMaster, defendant in the above entitled suit, for answer thereto, admits that he is in possession of the land described and set forth in plaintiff's petition, and avers that he is the true and lawful owner thereof; that he acquired the same by purchase from the widow and heirs of Antoine Philippon, jr., on the seventeenth day of June, 1847, according an act of sale passed before Theodore Guyol, notary public, in the city of New Orleans, an authentic copy of which act is hereto annexed.

Respondent further avers, that said widow and heirs by said act obligated themselves to warrant and defend the title of respondent, and maintain him in the peaceable possession of said land. Respondent represents that said widow is dead; that her heirs have taken possession of her succession; that those heirs and the sole surviving heirs of said Antoine Philippon, one Oscar Merle, Covine Merle, and Eugenie Merle, minor children of John A. Merle and Anais Philippon, deceased; that said John A. Merle is the tutor of said minors, duly qualified according to the forms of law to represent them. Wherefore respondent prays that said John A. Merle, as tutor of said minors, be cited in warranty to appear and defend in this suit the title of respondent to said tract of land. Respondent further represents that said Merle is now temporarily absent from the State of Louisiana, and that he has constituted and appointed Felix Grima his agent or attorney in fact to represent him in all matters involving the interest of said minors; wherefore respondent prays that service of process in this case be made by leaving the same with said Grima; and respondent further prays, that in case judgment be rendered in favor of said plaintiffs and against respondent for said land, that the same judgment be rendered over against the said John A. Merle, tutor, as aforesaid, and in favor of this respondent, together with all costs and damages.

(Signed) CHAS. P. COOK,
Att'y for Respondent.

Answer of F. Grima.—Filed 24th December, 1851.

United States Circuit Court.

UNITED STATES
vs.
JAMES McMASTER.
No. 2,061.

Felix Grima now appears into court, and says that he is the

agent of John A. Merle in his individual capacity, but has no authority or power to represent the said John A. Merle as tutor of his children. Wherefore he prays to be hence dismissed with costs, and, as in duty bound, &c.

(Signed) G. LE GARDEM,
Of Counsel.

Supplemental Petition.—Filed 10th January, 1853.

UNITED STATES
vs.
JAMES MCMASTERS.

And now comes the said plaintiff, by its attorney, and prays that this case be tried by a jury.

(Signed) L. HUNTON,
U. S. Att'y.

Order.

Let this be filed.

(Signed) THEO. H. McCALEB,
U. S. Judge.

Answer of R. A. Stewart.—Filed 9th November, 1854.

Fifth Circuit Court of the United States, eastern district of Louisiana—November 1st, A. D. 1854.

UNITED STATES OF AMERICA
vs.
JAMES MCMASTERS and RICHARD A. STEWART.

And now at this time, in vacation 1st of November, A. D. 1854, Richard A. Stewart, by attorney, tenders appearance in this case as defendant. And on showing to E. Warren Moise, esq., attorney for the United States herein, that he, said Stewart, since the institution of this suit had purchased the entire plantation of the defendant, McMasters, in which the land in controversy is included, and filing a copy of his title in this behalf, and upon condition he makes prompt defence, and interposes no delay of trial, he is by consent made a party defendant in this cause, and with the same privileges as if originally cited by process of law.

And thereupon said defendant, Stewart, for separate answer to plaintiff's petition herein saith: that he admits the United States, by the treaty of cession in said petition referred to, became invested with the civil and political dominion over the province of Louisiana, in which the land in controversy then was, but now embraced in the State of Louisiana.

Admits, also, said plaintiff by the same act of cession became proprietor of all the public lands in said province, but not of lands

reduced to private ownership. And defendant avers, that this plaintiff by said treaty incurred the just and reasonable obligation of *ascertain* its own property acquisitions from that owned by the citizens, and without any presumptions in favor of the plaintiff that all the domain was public property; and respondent avers the lands sued for were then, and are now, private property, and by the means instituted by the plaintiff in that behalf were so ascertained to be long before the institution of this suit, and were and are so reputed, denoted, and recorded in the proper archives of the government of the United States assigned for that purpose; that said property now belongs to this defendant as purchaser from the defendant, McMasters, as by proper title will be shown, and duly derived originally from the governments of France and Spain.

Respondent has examined the map and marked line of the attorney general exhibited with plaintiff's petition, and recognises the position of the Lecompt grant designed on said map, and the part which plaintiff claims in this action, and admits that when this suit was instituted said land was in possession of McMasters, but which land this defendant is now peaceably possessed of by good and sufficient title, derived from the Lecompt grant, which grant has been duly confirmed, and its survey and boundary, as in plaintiff's map is represented, rightfully approved in all things.

Respondent saith the pretensions of the plaintiff, originating in exceptions taken to the boundary and survey which has been accorded to the Bacheman grant in front, and the Lecompt grant in the rear, (and which exceptions equally apply to both,) as having been erroneously allowed by continuously diverging lines from the river to the lake, instead of being restricted to parallel lines from front to rear, is an exception without just foundation in law or fact. And the plaintiff's further assumption, that this survey, if corrected to a parallelogram, should be made to bound on the grants as surveyed on the lower side, instead of those on the upper side, is a misconception also, and equally groundless.

Respondent denies both these pretensions, and avers the survey of both these grants are rightly made, as presented in plaintiff's map. But if changed to a boundary between parallel lines, the correction would require the survey to bound on the upper instead of the lower grants, as will be hereinafter shown.

Respondent further answering, saith that when the Bacheman grant was made by the French government, on 23d March, 1765, it was already bounded on both sides by grants made forty-two years before. The petition of Bacheman solicited a grant of thirty arpents front, with the usual depth; the concession was reduced to twenty arpents, but when actually surveyed all the land found in front between the two older grants was fourteen arpents. And respondent is advised, that according to well established custom

of both France and Spain, to extend the side lines of their grants perpendicular to the front, whether converging or diverging, the side lines of this grant were already prescribed by the side lines of the older grants on either side, so soon as ascertained that the Bacheman concession was more than sufficient to absorb all the front land found between them.

In authentication of the correctness of the survey of the Bacheman and Lecompt grants, as in plaintiff's map represented, this respondent shows that the upper grants bounding on Bacheman and Lecompt were made in two concessions to J. De Laloire, one front, the other back, and together extending from the river to the lake between parallel lines, in the width of ten arpents. These two grants were surveyed from front to rear in 1830, by Augustus S. Phelps, a deputy surveyor of the United States, (who surveyed all the adjacent claims,) a plat of which survey, with the field-notes, duly certified, is herewith exhibited, marked (A,) as part of this answer, and which survey corresponds to the delineation of the same grants on plaintiff's map, eight arpents front, with depth through to the lake; of this De Laloire's claim were confirmed to Celestine La Chiappella, by special act of Congress, of date 19th May, 1832, in which this survey of Phelps is established in express terms—that fixing by law the direction of the side lines of this claim.

Two arpents, part of this De Laloire claim, and on the lower side thereof, were confirmed to Magloire Ginchard, together with ten of the fourteen grants to Bacheman. The petition of Ginchard to the commissioners in New Orleans, seeking comfirmation of his claim, of date 12th of April, 1833, setting forth his right to the two arpents of the De Louire grants, and of ten arpents of the Bacheman grant, together with a copy of the Bacheman grant, and the report of the commissioners on Ginchard's petition, are all herewith shown, duly certified, marked (B,) as part of this answer. By Ginchard's petition he claimed his upper line to bound on Chiappela, and his lower line from the river to the lake to bound on Phillipon, (under whom defendant claims,) and which boundary and survey were so allowed to him, as shown on the confirmed map and survey of the United States presented in evidence by the plaintiff. The commissioners in their report also describe the claim of Ginchard, which they confirm, as bounded on the lower side by Phillipon, and which report was confirmed by act of Congress of 4th of July, 1836, and whereby the Congress has confirmed this call and description of boundary.

Respondent further shows, that by the concession to Bacheman, a translation of which is herewith exhibited, marked (C,) as part of this answer, the upper side line of said concession was to bound on the lower side line of the lower side line of said concession; was to be parallel to the upper side line so fixed on De Laloire; is ne-

gatived by the language of the grant, which prescribes that the direction of the side lines of the 20 arpents above granted shall be determined by landmarks which shall be fixed to that effect, and a process verbal of which shall be drawn and annexed to these presents after being recorded in our book of concessions.

And respondent avers, to the best of his information and belief, no actual survey was made of said concession during the continuance of the French government in the province, which was superseded by the Spanish government four years afterwards.

Respondent further answering says, that the heirs of Phillipon, then owning the plantation now the property of this defendant, on the 20th of December, 1832, presented to the commissioners in New Orleans their petition for confirmation of their claim to said plantation, (including the land in controversy,) derived from six original grants, five of which they wholly represented, the Lecompt grant being one of those; and the sixth, the Bacheman grant, they represented to the extent of four arpents front, with diverging side lines corresponding to plaintiff's map, and the whole together having such shape and boundary as indicated by the survey and map of Augustus S. Phelps, presented therewith as part evidence of their claim, and which map was received and recorded as the law required. All these grants were proved, and the entire claim reported for confirmation. By said petition and map of survey, the claim presented is shown to be founded on the upper side by Ginchard, (whose claim and boundary is before shown,) and the report of the commissioners expressly describes the claim they report on as bounded above by the land of M. Ginchard; and which petition, map and report, duly certified, are herewith presented as part of this answer, marked (D,) and which report was confirmed by Congress, by act 3d of March, 1835. And respondent avers, the description of the boundary of this claim, as reported, conforms to the plat and survey presented to commissioners and shown in exhibit (D,) and he avers also that this plat and survey corresponds with the approved map and survey by the United States, as shown by complainant; and he avers also, as upon advice and belief, that the act of Congress confirming this report adopts its findings and descriptions, expressly and precisely as if incorporated in the statute.

Defendant avers also, that as the claim of Phillipon and Ginchard, by their calls, descriptions, maps, reports, and confirmations, are made to bound on each other from the river to the lake; and as the claim of Ginchard is in like manner bounded on its upper side by La Chiappella from the river to the lake, and these claims and reports all confirmed by Congress, and the boundaries of these claims in detail, all corresponding with the confirmed map and surveys of the United States exhibited by plaintiff, the fallacious

pretensions of said plaintiff to the land sued for are thereby exposed, and shown to be groundless.

And defendant avers also, that possession and claim of title by the parties respectively interested on the La Chiappella, Ginchard, Bacheman and Lecompt tracts, as delineated in the approved map and survey exhibited by plaintiff, have been held and asserted from time beyond man's memory.

Respondent further answering says, the Spanish grant to Lecompt does not restrict its limits to parallel lines, and does not fail or omit to prescribe the course and direction of its side lines, but has prescribed that its side lines shall have the same direction as those of the Bacheman tract in front, a mere extension of those lines to the lake. And the difficulty presented is the uncertainty resulting from such imperfect specification, and not defining the course of these side lines by geometrical instead of descriptive calls.

At the time of the concession to Lecompt, the Bacheman tract was then possessed and cultivated by three or four proprietors, and the vacant land granted to Lecompt was that which lay in the rear of these several plantations, a description which, as recited in the Lecompt concession, repels all fair inference that the rear grant began with a width of fourteen arpents, and continued on that parallel to the lake. And this more obviously, because said plantations are described as composed of the tract of fourteen arpents front, but omitting all description of its width rearward, as occupied by said plantations. And after such description of the front tract, it is further prescribed in the Lecompt grant that it shall be bounded by lines having the same direction with those of the front proprietors. And though said description is somewhat vague, yet respondent affirms, that from what is expressed, the unnecessary circumlocution to describe these side lines, if intended to prescribe them as parallel from front to rear, renders it quite certain they were intended to be divergent and conformable to the lines of adjacent proprietors. And their actual survey being the approved construction of said grants, have fixed with positive certainty the boundaries of these grants. A certified copy of said Lecompt grant and a translation thereof are herewith presented, exhibit (E), as part of this answer. Respondent further answering says, that the grant to Bacheman, exhibit (C), expressly calls bound its upper line on De Laloire, and according to the French and Spanish custom of laying off the side lines of grants upon water-courses before referred to, it is a geometrical fact that this upper side line prescribed to the Bacheman grant is an opening or divergent line from the centre and base of the fourteen arpents front, and entitles the lower line to a similar correspondent divergency, and such, as shown by plaintiff's map, has been accorded and approved, according to which boundary both grants are claimed, possessed, confirmed and surveyed.

Respondent further shows that the land granted to Lecompt had been bounded by the official surveyor, Louis Audrey, before the grant was executed, as recited and shown therein. He avers also that the Bacheman grant was duly surveyed under Spanish authority by the same Louis Audrey, and that maps and plans of said surveys did exist, and should reasonably have been found in the land office archives transferred with said province to the government of the United States, and that ancient proprietors of said grants, or portions of them, most probably had copies of the same; but after most dilligent inquiry and search for such Spanish maps and surveys by defendant, and his agents and attorneys, these maps and surveys have not been found; but if found before trial, defendant will produce the same.

Advised that the established side lines of the Bacheman grant prescribe those for Lecompt grant, defendant further shows, in respect to said Bacheman survey, that the said A. G. Phelps, in his report of his survey of the Phillipon claims in February, 1831, exhibit (D), in explanation of the course of the division line of the Bacheman tract between Phillipon and Ginchard, refers to Audry's plan of said Bacheman tract as then known to him, and expressly notes the opening lines of said Audrey's survey, and the course of Audrey's line is indicated on Phelps's map of survey of that portion of the Phillipon claim. And this map of survey, as before shown, has been fully approved by said commissioners, and by the act of Congress confirmatory thereof, and is identical with the approved map exhibited by plaintiff in this suit, and sought to be reviewed, annulled, and set aside by the judgment of this court.

And respondent submits, by way of pre-emptory exception, that all these questions, both of title and boundary, in this case, have been duly examined and reported on by the functionaries of government assigned to this service, and these acts and reports duly sanctioned by laws of Congress; that Congress but performed a duty in appointing the means for the ascertainment of such claims, and but an act of justice in giving to such inquests and reports legal sanction and approval, when satisfied of their correctness; that such acts and proceedings so sanctioned are conclusive against the government, except for fraud. No law has conferred the right or prescribed a rule by which government may have a judicial review of its own ministerial acts, and obtain relief for its mistakes, misjudgments, or indiscretion, especially after such acts have been ratified by law. The disposition of the public lands, their survey, and administration generally, (subject to the supervision of Congress only,) has been assigned to the Treasury Department, and this court therefore has no supervisory power in this case; that defendant's title having been made such by express law, it cannot by administration of law be unmade and adjudged illegal.

Wherefore, for all the reasons in defendant's answer here

shown and set forth, he prays judgment against plaintiff, and that he may be quieted in his title to the land herein sued for, and for all further relief as to law and justice appertains.

Respondent further answering, represents that he is a purchaser from McMasters of the land in controversy for a full consideration and with warranty of title, but for an aggregate price for this, with other lands and slaves included, in gross; and in case he suffers eviction by the judgment of this court of the lands sued for, he prays the same relief against McMasters as if cited into this court by defendant on his said warranty.

Respondent is advised that the jurisdiction of this court in this case is independent of the citizenship of the parties. Wherefore, on the event of plaintiff's recovery, he prays the court, at the trial of this cause, or upon a collateral hearing to be thereafter awarded, that this defendant do have and recover of the defendant, McMasters, the sum of $, the separate value of the lands to be recovered herein, together with all costs, damages, and expenses which this defendant may incur by reason of such recovery, and the expense of this litigation, and that all and further relief be awarded to this defendant against said McMasters as his case may warrant, and to justice shall seem meet.

(Signed) JOHN HENDERSON,
Attorney for Deft. Stewart.

[*For Map see original, page* 18.]

Exhibit A.

Extract from Aug's S. Phelps's book of field-notes of surveys in T. 13 S., R. 13 E., southeastern district La; east of the Mississippi river.

Sec. 5. Commenced at the upper front corner and ran down in front S. 34½° E. 24.40 ch's; S. 3° E. 5.19 ch's; 5.34° E. 2.35 ch's, to lower front corner; then N. 49½° E. 116.36 ch's, to post; ash S. 80½ W. 8 l'ks; ash N. 1¼ W. 16 l'ks; maple S. 20° E. 17 l'ks; cypress 5. 37¾° E. 36 l'ks; then N. 31½° W. 32.85 ch's, to a black gum tree standing on the right bank of a canal marked ×××, from which a gum on the other side of the canal bears N. 51¾° W. 27 l'ks; an elm N. 68° E. 15 l'ks; gum S. 31½ W. 41 l'ks; then S. 49° W. 116.36 ch's, to the place of beginning.

Eight arpents of this tract belong to Celestin Chiapella, and were granted to Joseph Laloire, the first Creole in Louisiana, by the French government, July 8th, 1723, and 2 arpents belong to Magloire Guichard (∗), and were granted to Jacob Corbin Bachemin(∗), book of French concessions No. 1, page 182.

Sec. 24. Celestin La Chiapella and Magloire Guichard granted to Joseph Laloire père by the French government on the 2d Janu-

Orleans sous les sceaux de nos armes et les contre seigns de nos secretaires, le veingt trois Mars mil sept cent soicante cinq. Signé Audry N. Foucoult; contre signé Soubie et Puvergé.

Extract.

(For translation vide Addenda, post, p. 2.)

Extract from an inventory of the property, &c., left by Mrs. Charlotte Moran, wife of Magloire Guichard, and made on the 20th July, 1810, by the parish Judge of the parish of New Orleans, assisted by the Deputy Register of Wills.

"Une terre de douze arpens de facé, dout dix out la profondeur ordinaire et les deux autres vont jusqu'an lac, borné par en haut par Mr. Jerome La Chapella et par en bas par Mr. Philippon, laquelle terre le dit Sr. Magloire Sinchard déclare étre en propre de (face) fine son épouse, comme lin ayant été abandonnée pour la vemplir de ses droits dans la succession de sa mere par feu Chevalier Morean son sére, et ce conpomment à la transaction, qui fut passée à cette, époque entre le feu Sieur Jean Landier, promier mari de la dite dame Charlotte Moreau et feu Chevalier Moreau, et dout le titre droit se trouver en letude de Narcisse Brontin, notaire public à la Nouvelle Orleans, la dite terre estimée avec ses entourrages, et les edifices qui se trouvent construintes dessus à la somme de dix hint mille piastres."

Sept'r 24th, 1812.—Vente d'habitation M. Debergne à M. Luichard.

(For translation vide Addenda, post, p. 3.)

Parderant Mr. Michel D. Armas, Notaire Public a la residence de la Nouvelle Orleans, Etats de la Louisiane, Etats Unis d'Ameriques et en preseme des temoins ai apines nommés et soussignés.

Fut present le Sieur Michel Debergne, propriétairé domicilié en cette et transporté des maintenant et a toujours avec promesse de garantie de tous troubles, done, dettes, hypotheques evections alienations, donations et autres empéchements quelconques. Au Sieur Magloire Guichard, habitant de cette paroisse a ce present et acceptant, acquereur pour lin, ses heritiers et ayant cause, une habitation située a trois tienes au dessous de cette ville et du même bond, mesurant douze arpens de face sur la profondeur ordinaire de quarante arpens, a l'exception d'une partie, dont la profondeur s'étant jusqu'an lac, ainsi et telle quelle fut adjugée a la defunte dame Landier par ordre et authorization de Loditeur des Luerres sous le régime Espagnol le vingt six November, mil hint cent deux; la ditte habitation, tenant par en hant a celle du Sieur Celestin La Chapella, ce devant siben, et par en bas a cette du Sieur Phillippon, ce devant Riviére, ensemble les maisons, Catisses et anthes etablissement qui se trouvaient sur la dite habitation, lors de la dite adjudication de vingt six Septembre, mil huit cent dix,

plus, vingt tetes d'esclaves au lien de vingt et un partés a l'Inventaire attendre la mort du nêgre nanmé Hazard survenne avant la dite adjudication, les vingt esclaves sus dits nanmées comme suit, savoir: Joseph, nêgre Creole, commandeur, age de quarante quatre aus; Louis, nêgre, d'environ quarante aus; Viena Francois, nêgre, age de soisante cing a soisante dix aus; Mars, nêgre, d'environ soisante aus; Celestin, nêgre, d'environ trente cing aus; Alexis, age de vingt sept aus; Augustin, nêgre, de vingt huit aus; Congo, nêgre, de vingt sept aus, Francois, nêgre, d'environ vingt cing aus; Lucien, nêgre, d'environ vingt aus; Rose, nêgresse, d'environ soisante cing aus; Mansiette, nêgresse, d'environ cinquante aus; Sanette, nêgresse, d'environ vingt trois aus; Pimta et son petit, agée de quarante aus; Margueritte, nêgresse, de quarante aus; Sophie, de cing aus; Azovine, de neuf aus; et Valsain, mulatre, infirme, agé de neuf aus; et enfin tous les menbles, menblans, effects et ustensilles de cuisine, ortils instruments aratoives, bestiaux et animaux décrites au dit Inventaires deposé au graffe de la cour des probates en cette ville, et dont copie certifie a eté presentement a la vue des notaires, et temoins soussigner par le sieur vendem remise au sieur acquereur qui le reconnait et en donne decharge, ainsi que le tout sus vender se pomsuit et comporte sans en vien excepter in reserver; lesquelles habitations, esclaves animaux et autres effects appartienent au sieur vendeur pour s'en être vendu adjudication l'ors de la vente a l'encan qui s'est faite par les Sieurs Putillet et Peyrellode encanteurs publics en cette ville, a la date du vingt et un Juillet, mil huit sept cent dix, des biens delaisses par la dame Charlotte Moran épouse du Sieur Magloire Guichard, dont Invertaine a été fait.

La présente vente est faite pour et moyennant la somme de trente mille piastres, que le vendem reconnait avoir vecu comptant des avant les présentes et hors la vue de nous notaire et temoins soussignées espéces ayant cours de monnaie, au profit du quel il consent bonne et valable quittance, venoncant quant a ce au benefice de la loi non numerata pecunia et autres y relatives, au moyen de quoi le vendem met et soubroge l'acquéreur dans tous les droits de propriété qu'il a et peut avoir sur le bien presentement vendue, s'en désaissisant a son profit, voulant qu'il en soit saisi et mis en possession par qui et ainsi qu'il appartiendra, constituant pour promeur le porteur d'une expestition, lin en dormant tout pouvoir; caìanisi se promettant, obligeant, renoneant, &c. Dont acte fait et passé a la Nouvelle Orleans en l'etude le vingt et un Septembre, mil huit cent donze en presence des Sieurs Felix de Armas, et Nichel, J. B. Fourcisy, temoins vequis et domiciliés, en cete ville lesquels aut ainsi que les Sieurs comparans signée apres lecture fait. Signée Mag're Guichard, M. Debergne, Felix de Armas, Fourcissy, et Michel d'Armas, not. pub.

Pour copie conforme a la minute, etant en la possession de Mr.

Felix de Armas, notaire, soussigné successeur immediat on dit Michel de Armas décéde Nouvelle Orleans le onze Febrier mil huit cent trente et un.

[L. S.] (Signée) FELIX DE ARMAS,
Not. Pub.

N. B.—For the grant (a patented concession) to Jousset de Laloir, sen'r, bearing date the 2d January, 1767, see page 208 of the book entitled "Libro 1o, French Concessions," &c., belonging to and forming part of the archives of this office.

LAND OFFICE, *New Orleans, August 17th,* 1854.

I hereby certify the foregoing to be a true copy taken from the records of this office.

Witness my hand, at New Orleans, on the day and year above written.

(Signed) LOUIS PALMER,
Register.

A No. 25.

Magloire Guichard claims a part of land situate in the parish of Saint Bernard, on the east bank of the river Mississippi, and about nine miles below the city of New Orleans, containing twelve arpens front by the ordinary depth of forty arpens, with the exception of the other two arpens front, which have a depth to the lake, bounded above by lands of Celestine La Chiapella, and below by lands of F. & J. A. Philippon. The said tract of land (with the exception of the extension of depth to the lake of a part thereof as above mentioned) is claimed in virtue of a complete grant made thereof, with a larger quantity by the French government to Jacob Corbin Bachemin, on the 23d day of March, 1765, and the said extension of depth to the lake is claimed also in virtue of a complete grant made by the French government to Jousset de Laloir, on the 2d day of January, 1767, under both of which grantees claimant holds by virtue of successive sales. We are therefore of opinion that this claim ought to be confirmed.

LAND OFFICE, NEW ORLEANS,
August 29th, 1854.

I hereby certify that the foregoing is a true and correct copy of the report of the register and receiver on the claim of Magloire Guichard, A No. 25, taken from the records of this office, and I further certify that the said report was duly confirmed by the act of Congress approved 4th July, A. D. 1836.

Witness my hand on the day and year above written.

(Signed) LOUIS PALMS, *Register.*

Exhibit C.—Filed with Def't Stewart's Answer, 9th Nov'r, 1854.

March 23d, 1765.—Concession to Bachemin.

Charles Philip Aubry, chevalier of the royal and military order

of St. Louis, royal commander in Louisiana, and Denis Nicholas Foucault, acting intendant commissary for this province.

Upon the application of Jacob Corbin Bachemin, late officer in the infantry, for the grant of a tract of land situate below the city, and on the same bank of the river, measuring thirty arpents front on the river St. Louis, or Mississippi, by the ordinary depth of forty arpents, and bounded on the upper side by the boundary line of the plantation of Mr. Laloire, his father-in-law, and considering the allegations in said application, and the certificate of Mr. Amelet Jugenier in this colony, the whole hereto annexed, we have granted and do hereby grant to him twenty arpents only front on said river, to be taken and commence from said boundary line, with the ordinary depth of forty arpents, to his proper use and behoof forever, but without prejudice to anterior rights of ownership or possession.

This grant is made on the following conditions, viz: That within a year from the date hereof, the grantee shall have made the establishment he proposes to make, in default whereof, the land shall revert to the king, who shall have the right to dispose of the same as though the present concession had never been made.

That he shall pay the seignorial rights, if any be hereafter established in this province.

That we reserve on behalf of his majesty the right of taking all the timber that may be necessary for the construction of forts, warehouses, and other works that now are or may hereafter be ordered, even for the refitting and *careeing* of H. M.'s vessels whenever necessary. That we further reserve the land that may be necessary for royal roads and fortifications.

As to the directions of the side lines of the twenty arpents above granted, they shall be determined by landmarks which shall be fixed to that effect, a process verbal of which shall be drawn and annexed to these presents after being recorded in our book of concessions.

Given in New Orleans, under our seals and the countersign of our secretaries, this 23d of March, 1765.

(Signed) AUBRY AND FOUCAULT.

Countersigned, SOUBRE and DUVERGNE.

Exhibit D.—Filed with Def't Stewart's Answer, 9th Nov'r, 1854.

A, No. 7.—Notice of claim of F. Philippon and J. A. Philippon.

To the Register of the Land Office and Receiver of Public Moneys, in and for the southeastern district of Louisiana, at New Orleans:

The notice of claim of François Philippon and Jean Antoine Philippon represents, that they are the owners each for an undi-

vided half of a certain tract of land, (established as a sugar plantation,) situate in the parish of St. Bernard, on the east bank of the river Mississippi, about ten miles below the city of New Orleans, measuring twenty-one arpens front by an irregular depth extending to Lake Borgne, bounded on one side by the plantation of Mr. Guichard, and on the other side (below) by the plantation of the widow Beauregard; the whole, according to a full and detailed plat thereof, executed by Mr. Augustus S. Phelps, U. S. deputy surveyor, in the month of February, 1831, herewith presented and prayed to be recorded.

The said plantation is held by the present owner and claimants by virtue of regular conveyances, and is derived from the following original grants or concessions, made and completed by the French and Spanish governments while in possession of Louisiana, to wit:

1st. A grant made in due form by the Spanish government to Mad'e Maria Lecompte for all the land in the rear of the fourteen arpens front by forty arpens in depth, owned by the heirs of J. C. Bachemin, to Lake Borgne, dated 3d November, 1784.

2d. A grant bearing date 28th January, 1763, made by the French government to S. Marquis, of all the land in the rear of nine arpens front by forty arpens deep, owned at that time by himself, to Lake Borgne.

3d. A grant made by the Spanish government to Dr. Henrique Daspres, dated 22d Sept., 1773, for all the land in the rear of eight arpens front by forty arpens in depth, owned by Mad'e Maria Lecompte, to Lake Borgne.

4th. A grant by the French government to Jn. B'te Leonard, bearing date Jan'y 3d, 1724, of eight arpens front on the Mississippi by 40 arpens in depth.

5th. A grant by the French government to François Galardit Chamilly, dated Sept. 27th, 1723, of nine arpens front on the river Mississippi by 40 arpens in depth; and

6th. A grant by the French government to Jacob Corbin Bachemin, bearing date 23d of March, 1765, of 30 arpens front by 40 arpens in depth.

Wherefore these claimants pray, the premises considered, that such of the documents presented by them in support of their said claim as may be deemed sufficient, may be duly recorded; and that a favorable report may be made on the said claim, as provided by the act now in force for the final adjustment of land claims in this district, approved 4th July, 1832.

New Orleans, 20th December, 1832.

(Signed) JOHN A. MERLE,
For Claimants.

See plat of survey hereto attached.

Survey, February, 1831.—*Remarks.*

Mr. Antoine Philippon, jr., the proprietor of the plantation described by the annexed plan, has exhibited to me the following documents, to wit:

1st. A Spanish grant to Mad'me Maria Lecompte, dated November 3d, 1784, for all the land in the rear of the 14 arpens front by 40 arpens in depth, owned by the heirs of J. C. Bachemin, to Lake Borgne, (sections 2 and 25.)

2dly. A French grant to Sr. Marquis, dated Jan'y 28th, 1763, for all the land in the rear of 9 arpens front by 40 arpens in depth, owned at that time by himself, to Lake Borgne, (sections 3 and 26.)

3dly. A Spanish grant to Dr. Henrique Desprez, dated December 22d, 1773, for all the land in the rear of 8 arpens front by 40 arpens in depth, owned by Mad'me Maria Lecompte, to Lake Borgne, (sect's 4 and 27.)

4thly. A French grant to Jn. B'te Leonard, dated Jan'y 3d, 1728, for 8 arpens front on the Mississippi river by 40 arpens in depth, (sec. 9.)

5thly. A French grant to François Galardit Chamilly, dated Sept. 27th, 1723, for 9 arpens front on the Mississippi river by 40 arpens in depth, (sec. 8.)

6thly. And section 7 is a part of French concessions, fos. 182 and 183, in the land office in New Orleans, also plans and processes verbal of the authorized surveyors of the times being, sufficient to give the courses of the different lines. All the outward boundary lines have been surveyed and measured by me, and have the following polar courses and distances, viz: the line C D runs N. 49½ 310 $\frac{22}{100}$ chains, A B S, 67 $\frac{1}{2}^{0}$ E. 116 $\frac{35}{100}$ ch's, which is the course of the present division fence between Messrs. Philippon and Guichard, but the line, according to the plan of Audry, should open 3° 15 more as represented by the dotted line A a. The line A E S, 14.05 E. 61.41 ch's; the line E F N, 71¼° E. 934.50 ch's, (at the distance of 296.50 ch's from E, this line intersects the range line (C F) between township No. 13, range 13, and township No. 13, range 14 E., on the east side of Mississippi river, 48.08 ch's north of the second mile-post on the same. The line C D is the present line between Messrs. Guichard and Chiapella, and is parallel to C C D. The border of the lake is also represented on the plan from actual survey and measurement; the field-notes of all which, giving a more particular description, will be found on record in the S. D. surveyor's office for the S. E. district of Louisiana.

Done in the month of February, 1831, by

(Signed) AUG'S S. PHELPS,
U. S. Deputy Surveyor for the S. E. District of Louisiana.

LAND OFFICE, *New Orleans*, 10*th June*, 1852.

I hereby certify the foregoing to be a true and literal copy from register H, book 8, pages 57 to 61, of record in this office.

In testimony whereof I, Charles Fier, register, have hereunto subscribed my name, on the day and year before written.

CHARLES FITZ, *Register*.

A No. 7.

François Philippon and Jean Antoine Philippon claim a tract of land, situate in the parish of St. Bernard, on the east bank of the river Mississippi, and about ten miles below the city of New Orleans, containing twenty-one arpens front by an irregular depth, extending to Lake Borgne, and bounded above by land of Mr. Guichard and below by land of Widow Beauregard.

The said tract of land is made of several tracts, all of which are derived from the original grants made and completed in due form, as follows, to wit:

1st. One made by the French government to François Galar dit Chamilly, on the 27th of September, 1723.

2dly. One also by the French government to J. B'te Leonard, on the 3d of January, 1724.

3dly. One also made by the French government to Sr. Marquis, on the 28th of January, 1763.

4thly. One by the same government to Jacob Corbia Bachemin, on the 23d of March, 1765.

5thly. One made by the Spanish government to Don Henrique Despres, on the 22d of September, 1773; and—

6thly. Another by the Spanish government to Ma'de Maria Le Compte, on the 3d of November, 1784.

Under all of which grantees the said claimants hold by virtue of regular conveyances. We are therefore of opinion that this claim ought to be confirmed.

LAND OFFICE, *New Orleans*, 10*th June*, 1852.

I hereby certify the foregoing to be a true extract from the report of Helary B. Cenas, register, and W. L. Robinson, receiver of public moneys, dated 5th September, 1833, made in pursuance of the act of 4th of July, 1832, entitled "An act for the final adjustment of claims to lands in the southeastern land district of the State of Louisiana," which report is of record in this office, and was approved by an act of 3d of March, 1835, entitled "An act supplementary to the act of 4th of July, 1832, entitled 'An act for the final adjustment of the claims of lands in the southeastern district of Louisiana.'"

In testimony whereof I, Charles Felix, register, have hereunto subscribed my name, on the day and year before written.

(Signed) CHARLES FITZ, *Register*.

Exhibit E.—Filed with Def't Stewart's Answer, 9th Nov'r, 1854.

Don Louis Isnaga y Amezaga, brigadier de los reales estos Na. vestas las antecedantes diligencias practicadas por el Segundo Ayudante de esta plaza Louis Audry, comisionado para el deslinde y possesion que la dado ad'a Maria Le Conte de la tierra vacante que se ella detras ó al cabo de los quarenta arpanes de profundidad que tien en las habitaciones Don Bachemin, Corbin, Voisin y Portugais y consiste en las catorse arpanes de frente de que se componen estas asta llegar al lago Borne y reconociendo estar reglada al orden de agrimensura y a las concessiones de los ante dichos sin que estos se les cause perjuicio alguno mi que los haian reclamado y se tien consentido sugun justifica su asistencia a dichos operaciones aprovandolas como las aprovamos. Usando de la facultad que el Rey nostien concedido ortorgamos en su real nombre a la suso d'ha D'a Maria Le Conte los mencionados quatorce arpanes de tierra de frente desp's de los quarenta de profundidad que poseen los referidos Bachemin, Corbin, Voisin y Portugais hasta llegar al precitado lago siguiendo la misma dereccion que corren los limites de estas para que como propio disponga de ellos y los usufrute reglandose a las antedichas deliquicias y observando los condiciones prevenidas en el reglamento del asunto. Damos la presente firmada de mi firmo se llada con el sello de nuestras armas y refrendada del infrascrito secretario de este gobiernos en la Nueva Orleans a tres de Noviembre de mil setecientos sestenta y cuatro.

DN. LOUIS DE UNZAGA Y AMIZAGA,
Por mando de su S'A D'N JOSEPH FOUCHER.

Exhibit E.—Filed with Def't Stewart's Answer.

LAND OFFICE, *New Orleans, August 8th*, 1854.

I, Louis Palms, register of the land office for the southeastern district of Louisiana, do hereby certify the foregoing to be a true copy taken from one of the records in my office, entitled "Register A, book No. 1," at page No. 288.

In faith whereof, I hereunto subscribed my name in the day and year above written.

(Signed) LOUIS PALMS, *Register.*

Translation of foregoing.

(Document annexed.)

Dn. Louis Isnaga y Amezaga, brigadier of the royal armies, considering the foregoing proceedings made by the Segundo Ayudante of this place, Louis Audry, who was appointed to make the survey, and put Dn. Maria Lecomte in possession of the vacant land which lies in the rear or at the extremity of the forty arpents in depth of the plantation belonging to Bachemin, Corbin, Voisin and Portugais, and consists of the fourteen arpents in front, com-

posing the said plantations until it reaches Lake Borgne; and finding that said proceedings are made agreeably to the order of survey, and to the grants of the above named parties, who are not injured and do not complain, nay, who have assented thereto, as is made to appear by their attendance at said proceedings, which are hereby approved:

Now, therefore, in the exercise of the powers vested in us by the King, we do by these presents, and in his royal name, grant to the said Maria Lecomte the above mentioned fourteen arpents front, from the forty arpents in depth, owned by the said Bachemin, Corbin, Voisin and Portugais, to the aforesaid lake, following the same directions which the boundary lines of the said Bachemin, Corbin, Voisin and Portugais run, in order that she may dispose and enjoy of the same as being her property, in conformity with the foregoing proceedings and the conditions in such cases made and provided.

We grant these presents, signed with our hand, sealed with our seal, and countersigned by the undersigned, secretary of this government, in New Orleans, on the 3d of November, 1774.

DN. LUIS DE ISUAGA Y AMEZAGA.

By order of his lordship,
JOSEPH FOUCHER.

Trial of Cause.

Minutes.—November Term, A. D. 1855.

New Orleans, Thursday, 20th December, 1855.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

THE UNITED STATES vs. JAMES MCMASTERS. } 2,061.

This cause was called for trial, and the following jury was sworn and empanelled to try the same, viz: John G. Cocks, Jno. D. Rein, Jno. S. Wallis, Jno. E. Hyde, H. T. Lonsdale, S. W. Rowlins, E. B. Smedes, Jos. Menard, E. C. Payne, R. W. Estlin, George Urquhart and Thos. J. Casey; whereupon, after the introduction of evidence, the case was opened by Jno. Henderson, esq., on part of defendant, and proceeded with until half after two o'clock p. m. Whereupon, it was ordered to be continued until to-morrow, at 10 o'clock a. m., and with the consent of the parties the jury were discharged till then.

Trial of Cause.

Minutes.—November Term, A. D. 1855.

New Orleans, Friday, 21st December, A. D. 1855.

Court met pursuant to adjournment. Present, Hon. Theo. H.

McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

THE UNITED STATES vs. JAMES MCMASTERS. } 2,061.

This cause as continued from yesterday was resumed before the court and jury, and after argument of counsel and charge from the court, John D. Bein was appointed foreman, and they retired to their room to deliberate upon their verdict, and shortly thereafter they returned the following into court as their verdict: "We, the jury, find for the defendant. New Orleans, 21st Dec'r, 1855. John D. Bein, foreman." Whereupon it was ordered that the verdict be recorded, and that the jury be discharged till further notice.

Affidavit of R. A. Stewart.—Filed 12th April, 1855.

United States Circuit Court, eastern district of Louisiana—In March, 1855.

THE UNITED STATES vs. JAMES MCMASTERS and RICH'D A. STEWART.

Richard A. Stewart, being duly sworn, deposeth and saith: That he is purchaser and present possessor of the plantation in the parish of St. Bernard, usually and long known as the "Thillepon plantation," which comprises several original separate grants, among which are part of a front grant called the Bachemin grant, and all of one on the rear of said Bachemin grant, called the Lecompt grant; that he purchased said plantation of James McMasters, who had purchased from the heirs of Phillipon. Beside the act of conveyance, affiant received but few muniments of title, and none of the original grants or surveys or plats of survey; but did receive a copy from the record of the registry of the land office at N. Orleans of the aggregate survey of the entire plantation, as confirmed to the heirs of Philipon by the government of the United States, as affiant was informed and believes.

Affiant purchased said plantation since the institution of this suit, and by consent made himself defendant thereto. That immediately after said purchase he employed John Henderson, esq., an attorney of this court, to investigate the title and prepare the defence. Affiant was informed by his said counsel, and on investigation induced to believe, that there had been original surveys and plats, under the Spanish government, of the Bachemin grant and the Lecompt grant, and that the originals of these, or authenticated copies thereof, were important to be used as evidence on the cause. Deponent made all diligent inquiry of the representatives of "Phillipon" and from the records of his parish for these plats or records

of them, but has not been able to find either; and he requested his counsel to have search made in all the offices where the custody of similar papers had been found, and so to procure them, if possible. Affiant has been informed, and he does believe, they are wholly lost or destroyed, or so mislaid as that they cannot be found.

(Signed) R. A. STEWART.

Sworn to and subscribed before me, this 12th April, 1855.

(Signed) J. W. GURLEY, *Clerk.*

Affidavit of John Henderson.—Filed 13th April, 1855.

Circuit Court of the United States for the eastern district of La.—March, 1855.

THE UNITED STATES
vs.
JAMES MCMASTERS et als. } 2,061.

John Henderson, being duly sworn, deposeth and saith: That he is the attorney and counsellor of Richard A. Stewart, a principal defendant in the above entitled cause. That soon after his engagement as such counsel, and during the spring of 1854, affiant became convinced that two grants of land, the boundaries of which are involved in this controversy, to wit, the front grant upon the Mississippi river, called the Bachemin grant, and the grant in rear of said Bachemin grant, called the Marie Lecompt grant, had both been surveyed, bounded, and plotted while the Spanish government had rule in Louisiana, and by its duly authorized functionaries; and especially was affiant convinced that the front tract, or Bachemin grant, had been surveyed and platted under Spanish authority by Don Louis Audry. And affiant supposed the plat of said survey should be found extant and existent, and rightfully found of record or on file in the office of register of public land in the city of New Orleans; but affiant, after most diligent inquiry and search at said register's office, and assisted by the register, could find neither original nor copy there; and admonished how irregularly these original surveys and plats of ancient grants in La. had been disposed of, affiant instituted and caused to be instituted by the several officers in charge a diligent inquiry after said original survey and plats, and of any recorded copy thereof, in the Land Offices at Washington city and at Donaldsonville, in Louisiana, and of the surveyor general's office of La., in New Orleans, and of the recorder's office in the parish of St. Bernard, where the land lies, and of several of the oldest records and depositories of the notarial offices in New Orleans, and made most diligent personal inquiries of various individuals, whom or whose families had had connection, directly or indirectly, with the title of these two grants; but all his researches and inquiries to find said original surveys and plats, or any record of them, have proved fruitless unavailing.

Wherefore he saith, and doth verily believe, said surveys and plats are lost and destroyed, or so mislaid as not to be found; and tenders this affidavit as proof, preparatory to the admission of secondary evidence of said surveys and plats, and the boundaries they had prescribed.

(Signed) JOHN HENDERSON.

Sworn to and subscribed before me, this 13th day of April, 1855.

(Signed) J. W. GURLEY, *Clerk.*
Per F. C. LAVILLE,
Dep. Clerk.

Affidavit of F. Grima.—Filed 20th April, 1855.

Circuit Court of the United States for the eastern district of Louisiana.

THE UNITED STATES
vs.
JAMES MCMASTERS and al.

Felix Grima, of the city of New Orleans, being duly sworn, deposeth and sayeth, that he was the attorney in fact of Mistress widow A. Philippon, from the month of June, 1848, up to her death, and that he has been, and is still the attorney in fact of John A. Merle, the tutor of his minor children, who are the grandchildren and sole heirs of the late Antoine Philippon and of his said late wife, widow Philippon. That immediately after the institution of the above entitled suit, affiant has written to the said John A. Merle, tutor aforesaid, then in France, in order to inform him of the institution of said suit, and has at the same time forwarded to him a copy of the petition filed in said suit, together with a copy of the documents annexed to said petition. That affiant has been informed by said tutor that at the time of the confirmation by the United States of the land involved in this controversy all the plans and surveys and titles of the said land existed; that to his personal knowledge the plan made by Louis Audry, surveyor under the Spanish government of the said land, together with the survey and title papers, were delivered by the late At. Philippon to the United States surveyors for the purpose of surveying the said land; and that Philps, one of said surveyors, had said titles, plans, and surveys in his possession for that purpose, and that the same were afterwards probably delivered by said surveyor to the commissioners of the United States, and should probably be found in the offices of the government either in Louisiana or in Washington city. That upon such information affiant has at different times made diligent inquiries and researches for said plans and surveys. That particularly in the fall of 1850, and up to the beginning of April, 1851, the said John A. Merle

being in the city of New Orleans, where he spent then several months for the affairs and interest of his said minors, and affiant did jointly with him, the said John A. Merle, make at different times diligent researches in the office of the surveyor general of the State, and assisted by said surveyor, in whose charge are a great number of old plans and surveys of lands made by the former governments in Louisiana; also in the office of the register of public lands in the city of New Orleans, and assisted by said register, for the purpose of finding the said plan and surveys of the lands involved in this controversy. That affiant and the said John A. Merle made also diligent researches in the offices of the several notaries in New Orleans in whose custody were the oldest notarial archives, and also made further researches in the office of the recorder of the parish of St. Bernard, where the said land is situated, but that they have not been able to find either the original nor a copy of the plan and survey made by said Luis Audry of the said land. And affiant further declares, that to his personal knowledge the said John A. Merle has caused diligent researches to be made for the same in the Land Office in Washington city, and at Donaldsonville, in Louisiana, and that all said researches have proved useless and unavailing.

Wherefore affiant saith, and does verily believe, that said plan and survey of Louis Audry are lost or mislaid.

F. GRIMA.

Sworn to and subscribed before me, at New Orleans, La., this 20th April, 1855.

J. W. GURLEY, *Cl'k.*

Plaintiff's Bill of Exceptions.—Filed nunc pro tunc on this 15th March, 1858, as of 21st Dec'r, 1855.

U. S. Circuit Court, 5th circuit and eastern dist. Louisiana.

THE UNITED STATES
vs.
McMASTERS and STEWART. } No. 2,061.

Be it remembered, that on the trial of the above cause the defendant, R. A. Stewart, offered in evidence to go to the jury the testimony of Augustus S. Phelfs, taken under a commission, made part hereof, marked (X,) to which testimony the plaintiffs, through Tom S. McCay, United States attorney for this district, objected, upon the following grounds, and for the reasons stated:

1st. Because testimony such as embraced in answer from 3d to 9th interrogatories is illegal and inadmissible, being parol testimony, to prove the "usual or almost universal" terms of grants from the Spanish and French governments prior to the cession of Louisiana, the plaintiffs requiring to be produced on the trial the grants and the ordinances of said governments authorizing them.

Again, said answer is argumentative; states, or pretends to state, laws and regulations of said French and Spanish governments governing surveyors under said governments, in making plans in their field of operations, and generally the principles controlling them in their surveys. The plaintiffs requiring the production of the laws and regulations of said governments, further said answer discloses the fact that instructions have been issued to U. S. dep. surveyors by "their superior" in all cases to conform to the original mode in French or Spanish mode of surveying; the plaintiffs required the production of the instructions in all or any case referred to in the answer.

2d. The witness, in the 10th answer, says "he surveyed the claims of Antoine Phillippon, the lands now in controversy, in February, 1831, officially, under a contract with the U. S. government, and agreeably to instructions from the surveyor general south of Tennessee, who then had jurisdiction over this district." "My survey of said claims, &c., was duly examined and approved by the competent authorities, and has not been objected to or set aside within my knowledge or belief; on the contrary, the general government and its officers have at various times subsequently recognised its validity by selling a portion of the public lands included within the same townships, as well as by confirming several private claims also situate within said township, and conformable to my surveys." This testimony is secondary, and the "instructions of the surveyor general south of Tennessee," the approval by "competent authorities," and the recognition of the witness's survey, were called for as the best evidence.

3d. The answer to the 11th interrogatory says, the survey of witness was made "strictly in conformity with an original plat of survey by Don Louis Audry, an ancient colonial surveyor general, in possession of and exhibited to me by Mrs. Phillipon, with an immaterial exception only, as to the water-front, necessarily resulting, &c. The plaintiff called for the production of Don Louis Audry's survey or plat, contending that proof of its contents could not be offered in evidence until its loss was legally proven.

The plaintiffs objected to the entirety of said Augustus S. Phelps's testimony, as containing impressions, traditions, hearsay; therefore illegal, as proving laws, ordinances, and customs of France and Spain, which should have been shown by the ordinances, laws, and customs, as proving instructions from his superior to State's officers, and the approval of his surveys, necessarily in writing, and therefore the best evidence of such instructions and approval, as argumentative, and endeavoring to force a conclusion in favor of title in defendants, without stating facts within his knowledge, though said argument is traditional, scientific, and political. And lastly, said plaintiffs objected to said Phelps's testimony, particularly in the 11th interrogatory, to establish a survey

by Don Louis Audry, upon the well settled rule that the plat or survey of said Audry, if it existed, was the best evidence of the metes and bounds of the land granted to defendant's vendors, and if the said plat had been or was lost, proof must first be made of such loss before parol proof could be introduced of the contents of the plat or survey.

The court having considered the objections of the U. States through its attorney, overruled the same, as going to the effect of the testimony, and not its admissibility; wherefore the plaintiffs take this their exceptions, and pray respectfully that the court sign and approve the same.

(Signed) THEO. H. McCALEB,
U. S. Judge.

The foregoing bill of exceptions *have* been submitted to us, as the present counsel of R. A. Stewart; and from the notes of the late Hon. John Henderson, and the declarations of the defendant, Stewart, we are satisfied that the points were reserved by the U. S. dis't att'y at the time of trial of the same. We therefore consent that the same may be now signed by the court nunc pro tunc.

(Signed) GEO. S. LACEY & R. A. UPTON,
Att'y fors R. A. Stewart.

Feb'y 20th, 1858.

Deposition of A. S. Phelps, annexed to foregoing Bill of Exceptions.

Circuit Court of the United States, eastern district of Louisiana—
April, A. D. 1855.

THE UNITED STATES
vs.
McMASTERS & STEWART.

Interrogatories propounded to A. S. Phelps, Esq., a citizen of New Orleans, La., whose answers when obtaind are intended to be used in evidence by defendants herein, on trial of the above entitled cause.

Int. 1st. Have you or not been employed as a commissioned surveyor of the United States; and if yea, when, where, and how long?

2d. Have been familiarly accustomed in your official service to the survey of private land claims in the State of Louisiana, under grants from the French and Spanish governments?

3d. From your official experience and observation, is it not known to you that the greater portion of the Louisiana grants of land by France and Spain were grants fronting on rivers, or other watercourses, running back in depth for quantity; and have you or not had frequent occasion to resurvey and retrace the old surveys made under the French and Spanish governments of such grants or concessions, or to execute the survey of such grants originally and for the first time? Them state fully.

4th. In your inspection and observation of these old grants, state if you have ever seen one of them; or if one or more, how many, or in what proportion to the whole, which contained a specification or direction of the course of the side lines, or rear line, and state if such grants do not always, or nearly always, omit such calls and specifications, even when the grant was made out in form, after the survey made and returned?

5th. In the execution of the surveys of the French and Spanish grants, where the grants are silent as to the course or call of the side and rear lines, please state clearly and distinctly what rule or custom guided the French and Spanish surveyors in laying down the courses and directions of the side and rear lines.

6th. Please state, if in all such grants fronting on water-courses in Louisiana, where the concession or grant omitted to specify calls and directions of the side and rear lines, and no prior grant or survey or other positive obstacle interposed to prevent, if the rule and practice of both the French and Spanish surveyors, and equally so with the surveyors of the U. States, have not uniformly been to survey the side lines perpendicularly to the water boundary front as a base line, and the rear line parallel with the front, and which rules and practice have been approved by each and all of these governments?

7th. Do you know of any French or Spanish survey in Louisiana, or any survey of such claims by the surveyors of the United States, which has not practically conformed to this rule of laying down the grant? Or if there be exceptions, has not the general practice been such? State fully.

8th. Has not a conformity with this rule and practice resulted in establishing the side lines of a great majority of such grants in Louisiana with convergent or divergent directions from the centre of the front base line, instead of perpendicular and parallel lines, and this irrespective of any special call for *cornes* in the grants or concessions themselves?

9th. Have you ever known this plan and rule of establishing the side lines to such grants in Louisiana, when executed by yourself or other surveyor of the United States, to be objected to in the surveyor's office in Louisiana, or the General Land Office at Washington, for reason, that because the grant or concession had not prescribed the course of the side lines, they should have been run parallel, and regardless of the fact whether the front base waterline was convex or concave? And if such objection were now made a ground for the conversion of previous surveys, what proportion of the heretofore approved surveys of claims in La. would thereby be disturbed?

10th. Were you or not the commissioned surveyor of the United

States who executed the survey of the claim of the heirs of Phillippon, which lies principally in T. 13, R. 13, in the southeastern district of Louisiana? and if yea, state when you executed said survey, and whether or not your survey was approved by the U. S. *States* government, and whether or not, so far as you know, said survey has ever been officially and formally set aside.

11th. Please look at the paper shown you with these interrogatories marked (A), purporting to be a report of the survey of the claim of Phillippon, and the map exhibit (B) purporting to be part of claims and surveys of T. 13, R. 13, in southeastern district of Louisiana, and including most of the survey of the Phillippon claim, and the paper exhibit (C) purporting to be the field-notes of the survey of the claim of Phillippon, all certified copies, and say if these papers represent the report, plat of survey, and field-notes made by yourself in the survey of the Phillippon claim, and are they correct?

12th. Look at the plat of the Bacheman grant represented on said map (B) as sections 6 and 7, and state if you know or believe, and your reasons for your knowledge or belief, whether the diverging side lines of said Bacheman grant were originally surveyed and established as now laid down on said map by the authority or by the surveyor of the Spanish government.

13th. Look at the dividing line between sec. 6 and 7, by which that portion designated sec. 7 is set off from the Bacheman grant to Phillippon, and say if you surveyed that dividing line when you surveyed the claim of Phillippon, and what was its course, and was its course exactly right in apportioning its divergency from front to rear, with the divergency of the side lines of the entire claim.

14th. If said dividing line was not accurately apportioned, why did you follow and adopt it as a correct boundary line of the Phillippon claim? Did you have any ancient maps before you at the time for your guide, and which showed the line to be anciently established, and by what surveyor, and under what government? State fully in explanation.

15th. Look at the map (B), and to that part of it which represents the Marie Le Compt grant as section 25, and state if you surveyed and laid out the side lines of said grant, as appearing in said map; and if yea, what evidence, principle, or guide had you which induced you to give the divergency rearward to the side lines which they present in said survey? Had you then present any Spanish maps, or diagram of survey, which had marked out said side lines or the side lines of the front Bacheman grant in the course and direction as they appear upon said map (B)? If yea, please describe such map or diagram, or whatever else induced you to lay down those lines.

16th. Do you know by history, tradition, or common fame, who

"Don Louis Andre" was, and whether or not he was an official surveyor under the Spanish government of Louisiana? Have you in your official service often met with surveys, plats, and maps of land made by him under the former Spanish government, and from your knowledge and belief were the side lines of the Bacheman and Le Compte grants as now indicated on map (B) originally laid down and established by him?

17th. Do you know if any such map or survey of the Bacheman or Le Compte grant, executed by Don Louis Andre, or any other commissioned surveyor under the former government of Spain or France, or any authentic copy thereof, is now extant; and if so, where?

18th. When you surveyed this claim of Phillippon, please state if the Bacheman or Le Compte grants were fenced, occupied, and cultivated up to, and according to the divergent side lines assigned to them in this map. Were they or not possessed in fields from which the cypress and other stumps had perished or been eradicated up to these lines; and did not the possession and cultivation bear evidence of ancient and long established use? and state from appearances, and how long.

19th. Do you know anything further material to the matters in issue in this case? if yea, set it forth in full in answer to this general interrogatory.

(Signed) JOHN HENDERSON.

No cross-interrogatories.

E. WARREN MOISE,
U. S. Attorney.

It is also understood at the same time that if, after seeing Mr. Phelps's answers which may be given to the foregoing interrogatories, the dist. att'y should require other questions answered, he may propose and take them without further notice.

April, 1855.

(Signed) JOHN HENDERSON,
Att'y for Def't.

Exhibit (*A.*)

Survey, February, 1831.

Remarks.—Mr. Antoine Phillipon, jr., the proprietor of the plantation described by the annexed plan, has exhibited to me the following documents, to wit:

1st. A Spanish grant to Mad'mé Maria Le Compte, dated Nov. 3d, 1784, for all the land in the rear of the 14 arpens front, by 40 arpens in depth, owned by the heirs of J. C. Bachemin, to Lake Borgne, p. sections 2 and 25.

2d. A French grant to Sr. Marquis, dated Jan'y 28th, 1763, for all the land in the rear of 9 arp's front, by 40 arp's in depth, owned at that time by himself, to Lake Borgne, s. 3 and 26.

3d. A Spanish grant to Don Henrique Desprez, dated Dec'r 22, 1773, for all the land in the rear of 8 arp's front, by 40 arp's in depth, owned by Mad'me Maria Le Compte, to Lake Borgne, (sections 4 and 27.)

4th. A French grant to Jn. Bte. Leonard, dated Jan'y 3d, 1724, for 8 arpens front on the Mississippi river, by 40 arpens in depth, (s. 9.)

5th. A French grant to François Galar dit Chamilly, dated Sept. 27th, 1723, for 9 arpens front on the Mississippi river, by 40 arp's in depth, (s. 8.)

6th. And sec. 7 is a part of French concessions, fos. 182 and 183, in the land office in New Orleans; also plans and processes verbal of the authorized surveyors of the times, being sufficient to give the courses of the different lines. All the outward boundary lines have been surveyed and measured by me, and have the following polar courses and distances, viz: The line C D runs N. 49 $\frac{1}{2}$ 310 $\frac{22}{100}$ chains; A B, S. 67 $\frac{1}{2}$ E. 116 $\frac{36}{100}$ ch's, which is the course of the present division fence between Messrs. Phillippon and Guichard; but the line, according to the plan of Audry, should open 3° 15′ more, as represented by the dotted line A a; the line A E, S. 14.05 E. 61.41 ch's; the line E F, N. 71 $\frac{1}{4}$ E. 934.50 ch's, at the distance of 296.50 ch's from E.; this line intersects the range line (e f) between township No. 13, range B, and township Nos. 13, range Nos. 14 E., on the E. side of Mississippi river 48.04 ch's north of the second mile-post on the same. The line C D is the present line between Messrs. Guichard and Chiapelle, and is parallel to b c d. The border of the lake is also represented on the plan from actual survey and measurement, the field-notes of all which, giving a more particular description, will be found on record in the P. D. surveyor's office, for the S. E. district of Louisiana.

Done in the month of February, 1831, by—

(Signed) AUGS. PHELPS,
U. S. Dep. Surveyor for the S. E. District of Louisiana.

LAND OFFICE, NEW ORLEANS,
18*th April*, 1855.

I certify the foregoing copy to be correct and true, taken from the records of this office.

Witness my hand at the time and place above written.

(Signed) LOUIS PALMS,
Register.

[*For map see original, page* 57.]

Exhibit (C.)

Extracts from the Field-notes of A. S. Phelps, D. S.

S. 6. Magloire Guichard, granted by the French government to Jos. Corbin Bachemin. See book of French concessions No. 1, page 181. Commenced at the upper front corner; thence down in front S. 34 E. 28.04 ch's to lower front corner; then N. 67½ E., and at 111.60 pass an old borne, and at 116.36 ch's set post; an ash S. 77½ W. 10; an ash S. 32½ W. 18; an ash S. 45½ E. 23; a gum N. 6½ E. 21; then N. 32° 35 W. 65.05 ch's to a post previously eslished. Area 531.29 acres.

S. 7. Antoine Philippon, granted by the French government to Jacob Corbin Bachemin. See book of French concessions No. 1, page 182. Commenced at the upper front corner; then down in front S. 21 E. 850; S. 13 E. 330 ch's to lower front corner, then N. 71¼ E. 116.36 ch's to post; an ash N. 32 E. 16; a gum S. 16 E. 20; a small maple N. 15 W. 23; then N. 19¾ W. 1,942 ch's to post previously established. Area 181.82 acres.

S. 8. Antoine Philippon, granted by the French government to François Galar dit Charmilly, September, 27th, 1723. Commenced at the upper front corner; then in front S. 13 E. 26.31 ch's 40 lower front corner; then N. 71¼ E. 116.36 ch's to post; a cypress S. 38½ E. 26; a gum S. 69 E. 22; a gum S. 78 W. 31; then N. 13 W. 2,631 ch's to post previously established. Area 304.63 acres.

S. 9. Antoine Philippon, grants by the French government to John B'te Leonard, July 3, 1724. Commenced at the upper point corner; then down in front S. 13 E. 23.39 ch's to the lower front corner; then N. 71¼ E. 116.36 ch's to post on left bank of a canal; a gum S. 18 W. 27; and ash N. 5 W. 11; a gum N. 36 W. 27; then N. 13 W. 2,339 ch's to post previously established. Area 270.77 acres.

S. 25, 26 and 27, S. 2, 3 and 4, in T. 13, R. 14 E., owned by Antoine Philippon, sections 25 and 2, granted to Mad'e Maria Le Compte by the Spanish government, Nov. 3d, 1784; sections 26 and 3 granted to Sr. Marquis by the French government, July 28, 1763; and sections 27 and 4 granted by Spanish government to Don Enerique Desprez, Dec. 22, 1773.

Commenced at the lower front corner of sec. 9, then N. 71¼ E., and at—

32.50 leave end of Beauregard's canal.
85.15 cross small branch of bayou.
115.20 do. do. do.
120.45 cross large bayou running left.
133.65 cross fork of bayous running left.
138.85 cross another fork of same.
162.00 cross small bayou running left.

162.85 cross another fork of bayou.
167.00 do. do. do.
177.25 enter prairie.
178.20 cross a bayou running left.
181.14 intersect range line and connected south 804 ch's to ½ mile post; on 3d mile north set a post, a maple, S. 1½ W. 75; then continued on same course through T. 13, R. 14.
194.10 cross Bayou Bois, about 60 ft. wide.
213.40 cross small bayou running right.
228.65 cross bayou 20 ft. wide, which connects Bayou Bois with a large bayou to the left.
244.75 cross a bayou about 75 ft. wide.
256.75 cross small bayou.
295.00 cross a bayou about 75 ft. wide.
321.30 cross a bayou about 60 ft. wide.
426.75 cross large bayou.
432.00 cross small do.
449.00 cross large do.
464.80 cross bayou about 50 ft. wide.
493.60 cross small bayou.
495.00 came to continual chains of lagoons, which are impassable either on foot or in a boat; made offsets to the left, and ran nearly all the remainder of this line by offsets.
818.00 set post on bank of Lake Borge, 5.62 chains to the left of the abrupt point of "Point Trois Bayous," at which abrupt point the shell bank ends, going down the bank of the lake towards the Gulf of Mexico.

Then traversed up the lake, as follows:
N. 28¾ W., 3.38.
N. 38¾ W., 15.00.
N. 42 W., 17.00.
N. 48 W., 20.00.
N. 58¾ W., 40.00.
West 35.00 to end of shell bank.
S. 61 W., 145.00.
S. 65 W., 47.00, to mouth of Bayou Marangoin.
S. 66 W., 94.00.
West 93.00.
N. 72 W., 45.00. The shell bank commences about 10 chs. below this point, and extends to Bayou Esprez.
N. 47¼ W., 30.00, having passed Philippon's house at 23.
N. 64 W., 34.00.
N. 41½ W., 15.00.
N. 58¼ W., 12.00, to a post on right bank, and at the mouth of Bayou Desprez. From this point the wall opposite centre of Montilo Castle bears S. 33 W. 692 chs.

N. 25¼ W., 73.68 chains to post previously planted on lower line of section 24.

Whole area, 9,423.13 acres.

SURVEYOR GENERAL'S OFFICE,
Donaldsonville, La., 9*th*, 1855.

A true extract from the approved field-notes of T. 13 S., R. 13 E., S. W. D., on file in this office.

(Signed) WM. J. McCULLOH,
Sur. Gen. La.

Answers of A. S. Phelps to the Interrogatories filed with Exhibits A, B, and C, 29th May, 1855.

Circuit Court of the U. S., eastern district of Louisiana.—April, 1855.

THE UNITED STATES
vs.
McMASTERS and STEWART.

Answers of Augustus S. Phelps to the Interrogatories propounded by Defendants.

Answer to the 1st interrogatory. I was first commissioned as U. S. deputy surveyor for the State of Louisiana in the year 1828 or 1829, and have been re-commissioned in the same capacity under the several surveyors general from that time to the present.

Answer to 2d interrogatory. I have re-surveyed more than a thousand tracts of land, the titles to which were derived from French or Spanish grants, and mostly located upon either side of the Mississippi river, in the section of country lying between the mouth of Red river and the lowest grants on the Mississippi river.

Answers to 3d to 9th interrogatories, inclusive. In the portion of Louisiana mentioned in the section of country above mentioned certain general rules appear to have been observed by the government officers and surveyors, during the whole period of the colonial existence, as regards the concession and survey of lands, whether under French or Spanish authority. In the earlier period, grants were usually or almost universally given to settlers fronting on rivers or other water-courses, calling for a specified distance of front on the bank of the water-course, with side lines running back from the front and nearly at right-angles with the water front at the point of departure, to a distance of 40 arpents, equal in our measure to $116\frac{36}{100}$ English chains. A right line connecting these two points completed the boundary of the tract, without specifying or having reference to the superficial quantity, which was seldom or never mentioned in either the grant, plat, or procès-verbal of survey. As the settlements in the colony extended and increased,

double concession grants, as they were called, were given, bounded by a grant or grants in front, with an extension of the side lines of the tract in front of them to an additional distance of 40 arpents, usually, but frequently, specially in the vicinity of New Orleans to the lake, or some water-course in the rear, and sometimes to an indefinite distance.

I have examined and inspected many hundreds of all the papers connected with the French and Spanish grants, being original documents. In the decree or concession which was issued by the representative of the king, and which conveyed the fee to the land, I do not remember a single instance in which it described the course or direction of any of the boundary lines. The usual form in which the boundaries and extent of the tract was expressed in the concession was, the specific length of the front on a particular water-course, bounded above (on one side) by the lands of A. B., (the adjoining proprietor,) and below (on the other side) by the lands of C. D., or public domain, as the case may be; and extending to the ordinary depth, (profundidad ordinario,) which was always understood to mean 40 arpents of Paris, or, as frequently the case in the vicinity of New Orleans, to a water-course, and sometimes, but very unfrequently, to some other specified or to an indefinite distance. Some instances I have known in which it was stated in the grant of a double concession that the length of the front of the double concession was a certain length, corresponding with the front of the tract immediately in front of it, though, in fact, it was surveyed occupied, and always held and regarded as having a much greater or less length of front, as the case might be, depending on the converging or diverging of the side lines of the front tract.

In the plat and procès-verbal of survey emanating from the king's surveyor, who was always a commissioned officer of high standing, the general custom was to note very definitely the following facts: the shape and length of the front line or lines, the course or direction (usually a right line with a magnetic bearing) of the side lines, their lengths, and the names of the grantee and of the adjacent proprietors. The courses and lengths of the back or rear lines were seldom or never mentioned in the procès-verbal, and were not after shown upon the face of the plat. The main object with French and Spanish surveyors were to furnish the means of perpetuating and identifying with great certainty the boundaries of the front portion of the tract of land surveyed, together with the means of ascertaining at any future time the direction of the side lines, giving little attention to the boundaries of the balance of the tract, which in fact was at the time frequently nearly, if not quite, inaccessible. In order to define and exhibit clearly and minutely their operations as made on the front of the tract, it was necessary to protract the plat or diagram on so large a scale, that the ordinary size of paper used by them generally

(foolscap) could only contain the figure of the front portion of the tract, and extending back a few arpents, which was indeed as far generally as the marks of the survey on the ground extended.

So far as I have been able to learn from tradition and observation, the French and Spanish surveyors, who delivered the land to the grantee, always endeavored to run and establish the side lines of the grants in this portion of the colony, so that said side lines should be, as near as they could judge, at right-angles with the general course of the water front within view; this view in most cases must have been of limited extent, by reason the banks of the water-courses must have been densely covered with forest trees and undergrowth. Hence it happens that in a great majority of cases the side lines of the grants are either diverging or converging, and not parallel. Another result would be derived from the practice of their system, and which is found to be the fact, is, that within this portion of the colony there is not to be found any vacant lands of triangular form or otherwise lying between adjacent tracts, as granted and surveyed, only when lands once granted have been entirely abandoned by the grantee or his successors, except in one case, which is in West Baton Rouge, and in this case there is ground to believe it resulted from an unintentional error.

In re-surveying French and Spanish grants in Louisiana, whether under contracts with the general government or for individual claimants, the U. S. deputy surveyors have been instructed by their superiors in all cases to conform to the original mode as far as it could be known and was possible. For my part, I have always conformed to and obeyed those instructions to the best of my ability; and all other surveyors, so far as I know and believe, have pursued the same practice. I have never heard the propriety of this practice questioned, unless it may be in the case now in controversy.

☞See answer to 19th interrogatory, p. answer to 10th interrogatory. I surveyed the claims of Antoine Philippon, the lands now in controversy, in February, 1831, officially, under a contract with the U. S. government, and agreeably to instructions from the surveyor general south of Tennessee, who then had jurisdiction over this district. My survey of said claims, and of the townships in which they lie, was duly examined and approved by the competent authorities, and has not been objected to or set aside within my knowledge or belief. On the contrary, the general government and its officers have at various times subsequently recognised its validity by selling a portion of the public lands included within the same townships, as well as by confirming several private claims also situate within said townships, and conformably to my surveys.

Answer to 11th interrogatory. The paper annexed to interrogatories marked A appears to be a copy of the procès-verbal annexed to a plat of the claims composing Mr. Philippon's plantation, made

by me for him in 1831 for the purpose of being presented to the U. S. commissioners on a proposed application for confirmation. I observe some errors in this copy as to the courses of some of the lines; they ought to agree with the courses as shown on the plat or diagram annexed, marked B, which appears to be a correct copy of the plat made by me at the same time, as far as it goes. The portion of the paper A which describes the material portion of the original papers then in the possession of Mr. Philippon, and by him then as well as frequently afterwards exhibited to me, I believe to be correct. The paper also annexed, marked C, is a copy of a portion of my field-notes of the surveys in T. 13, R. 13 E., S. E. land district of Louisiana, as made in 1831, and returned to the principal deputy surveyor at Donaldsonville, my superior in this district, and I believe the copy is correct.

Answer to interrogatory 12th. The two tracts represented on the map B as sections Nos. 6 and 7 were surveyed by me strictly in conformity with an original plat of survey by Don Louis Audry, an ancient colonial surveyor general, in possession of and exhibited to me by Mrs. Philippon, with an immaterial exception only, as to the water front, necessarily resulting from the fact that there had been some caving of the river bank.

My reasons for being certain of the fact as above stated are: First, my recollection of having seen the plat of Audry is distinct and clear. Second, reference was made to said plat of Audry in my procès-verbal at the time. And, third, as neither of the extreme side lines of the Bachemin grant were actual boundary lines of lands as held at the time of making my survey, but both were in the interior of tracts as owned and possessed at that time. I cannot imagine any reason which could have operated a departure from the original survey, as indicated on the plat and procès-verbal of Audry.

Answer to 13th interrogatory. I did survey the line mentioned at the time of surveying Philippon's claim, and its course was sixty-seven and a half degrees east of north, true course. Its course was not correct as compared with the original survey, and the universal usage in making partitions.

Answer to 14th interrogatory. At the time of making the survey, the boundary line between the lands of Mr. Philippon and those of Mr. Guichard (being the line shown on the plat as between sec's 6 and 7) was indicated on the ground by a variety of very distinct and unmistakable marks, showing that said boundary had been regarded for many years as found. Supposing it to be a good boundary by prescription, it was by the consent of the parties adopted; though, as will be seen by referring to my procès-verbal, I mentioned a discrepancy. This being a line made since the date of the original survey, and in the interior of the grant, would not exist on the original survey of the grant. The universal custom

from the earliest period until the time I made the survey was, in case of making a partition of a tract of land having converging or diverging lines, to give each portion of the tract divided, lines converging or dividing pro rata with the water front. Hence, this line between sec's 6 and 7, by deduction, ought to have been run considerably more to the left hand in going back from the river, in order to conform with the original survey, and the customs of the country.

Answer to 15th interrogatory. I surveyed and laid out the side lines of the grant of Maria Le Compte, as represented in part on the map B, (a portion of the grant extending into the next township, and not shown on this map.) My impression is, that I had before me, at the time of making said survey, the original survey and procès-verbal, made by Don Louis Audry, for this rear grant, as well as for the front grant. In the land office of the S. E. dist. of Louisiana will be found a book of records of French and Spanish concessions, marked (A.) At page 288 in said book will be found a record of this grant to Madame Le Compte, dated 13th November, 1774, and signed by Don Louis De Nuzaga y Ameragu, then governor of the province, in which it is stated that the grant is made according to a survey by Audry. My recollection is clear that I did see a plan and procès-verbal of survey made by Audry for either the front tract (Bachemin) or the rear tract (Mad'e Le Compte,) and probably both. Either of said surveys, however, would have been a sufficient guide to lay off the land of Mad'e Le Compte, as the universal custom was to extend the side lines of the front tract to make the side lines of the back tract, unless the contrary was expressly defined in the grant or survey.

Answer to 16th interrogatory. I have often heard the old residents speak of Don Louis Audry as former surveyor general under the Spanish government, about the period between the years 1770 and 1780. I have seen a great number of plats of survey made by him officially, and never have heard any question as to their authenticity. I have often found bornes or posts as described in his procès-verbal of surveys, existing at the time when I was engaged in making my earliest surveys, say from 1828 to 1835, many of them having marks so peculiar and minutely described as could not be mistaken as to their identity. My belief is that the survey of both the claims of Bachemin and Mad'e Le Compte, as made by me in 1831, conform in every particular with the original surveys of the said grants as made by Audry.

Answer to 17th interrogatory. The last time I ever saw the plats and surveys of these claims by Audry, they were in the possession of M. Philippon, at his house, on his plantation, and it was whilst I was engaged on the Mexican Gulf railroad, which runs through it; this I think was in 1838 or 1839, and not long previous to the

death of Mr. Philippon. I have never seen or heard of them since, and do not know whether they exist or not.

Answer to 18th interrogatory. In 1831, when I surveyed the claim of Phillippon, and for many years afterwards, say up to the time of his death, the front portion of the tracts marked on map B, as sec's 7, 8 and 9, was cultivated as a sugar plantation, extending from the river back from upwards of half to a mile in depth. The upper side line, say as shown on the maps between sec's 6 and 7, in 1831, was defined by a cypress picket fence, running upon a ridge made by throwing the earth out of two canals, one each side of said line, as usual in this section on boundaries, and on the ridge had been planted pecan trees, evidently designed to perpetuate and identify the said boundary, and having the appearance of having been so regarded for a period of more than twenty-five years. A borne or boundary post was found by me at that time on said line, near its rear termination, and is noted in my field-notes made at the time. This borne had the appearance of having been planted there by the ancient colonial surveyor, as it resembled their fashion in every particular, and it was at the time taken to be an original boundary post intended to mark the point of termination of the front grant. The fact that it was found a little less than 40 arpents from the river bank could be easily accounted for from the fact that the river bank had caved in. The appearances of the fields of Mr. Philippon, at the time I surveyed these claims, would justify the belief that the principal portion of them had been cultivated for fifty years or more.

On the rear tract, (the grant of Mad. Le Compte,) Mr. Philippon had a house built near the banks of Lake Borgne, and not far from the mouth of Bayou Deprez. As near as I can remember, it was about three-fourths of a mile in a southeast direction from the military tower erected by U. S. near the said mouth of Bayou Deprez. This house was generally occupied by one or two slaves of Mr. Philippon, who were employed in minding his cattle, and frequently temporarily occupied by himself and his friends, who visited that locality for hunting, fishing, or recreation. There was another small house or cabin belonging to Mr. Philippon, situated on a narrow ridge of wooded land near a small bayou called Bayou Maringuoin, which was occupied occasionally by the herdsmen of Mr. Philippon, who had on that ridge a small stock of cattle and hogs. This cabin was situated in the woods, and, as near as I remember, about three miles in a southeast direction from the military tower above mentioned. Mr. Philippon had a large canal leading from his front fields through the woods, and falling into Bayou Deprez near the point marked on the map, in the forks of said bayou, "Old Fort." On each side of this canal, for some distance into the claim of said Madame Le Compte, Mr. Philippon enjoyed possession and occupation during the period when I fre-

quently visited him—say from 1830 to 1840, by cutting cord-wood and procuring cypress timber for the use of his plantation.

Answer to 19th interrogatory. Nothing further occurs to me as pertinent to this controversy, which I have not already stated, except one fact which may or may not be of any importance; it is this: during the time as above mentioned, from 1830 to 1840, I was very intimate with Mr. Philippon, and was often in the habit of visiting him, and spending much time at his establishment on the lake, hunting and fishing. During that time I frequently met officers or agents of the U. S. government at the house of Mr. Philippon, and also going and coming from the lakes, who were going to or returning from the military post at the mouth of Bayou Deprez. They always conversed with Mr. Philippon in such manner as would lead him and others to suppose that they regarded said military post as being situated on the land of Mr. Philippon, as well as the whole route they travelled from the river back to said post, as belonging to Mr. Philippon. *Mrs.* Philippon always claimed the land as his, on all occasions when speaking of the erection and occupancy of said post by the government, and frequently spoke of his intention to claim compensation from the government; but being very old and fond of quiet, he never, so far as I know, carried his expressed intention into effect.

NOTE.—In reviewing the foregoing, I perceive that I have not answered interrogatory 16th so full as I might. I now, therefore, further state, as to the question, "who" was Don Louis Audry, that I have seen it written on a procès-verbal signed by him, of a certain survey made by him, dated 22d December, 1774, in favor of Simon Calpha, his title or official designation, as follows, viz:

"Capitaine d'infanterie and aide major de place de la Nouvelle Orleans, chargé par commission du government des fonctions d'ingenieur and d'arpenteur en cette province de la Louisiana," &c.

To the best of my remembrance, his title was thus designated on all plats and surveys which I have seen made by him in substance, though sometimes expressed and written in the Spanish language.

(Signed) AUGT. J. PHELPS.

Sworn to and subscribed before me, this 29th day of May, 1855.

(Signed) J. W. GURLEY,
Clerk.
By F. C. LAVILLE,
Dep. C'k.

Agreement of Counsel.—Filed 19th Dec'r, 1855.

U. S. Ct. Court, East. Dist. La., 1855.

U. STATES
vs.
McMASTERS & STEWART.

Agreement of Counsel.

It is agreed, that the map of the U. S. surveys, including the locus in quo, filed with the petition of the plaintiff, if lost, may be supplied by any other certified map; and that the mark made on the lost map, and referred to on the petition as the assumed limits of the claim of the U. S., was a straight line setting off to the defendant the supposed amount of 14 arpens from front to rear of the Le Compt grant, in the rear of the Bachemin grant, and on the lower side of the Le Compt grant, as shown in the public surveys.

But it is further agreed, that the United States may prove title to any part of the Le Compte grant, whether described on the petition and map exhibited or not: Provided, if the jury find for the U. States, they shall specify where and what part of the land the U. States have right to, and how it should be set off.

It is agreed also, that the title of Stewart from McMasters need not be filed in the case, but is admitted to be a sale of the whole plantation, as described and set forth in the title from Philippon's heirs to McMasters, filed with McMasters' answer, but defendant may introduce it at any time if they think proper.

(Signed) TOM. S. McCAY,
U. S. Att'y.
JOHN HENDERSON,
Att'y of Def't.

Judgment.

Minutes.—November Term, A. D. 1855.

New Orleans, Monday, 14th January, 1856.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

THE UNITED STATES
vs.
JAMES McMASTERS. } 2,061.

By reason of a verdict of the jury herein rendered and recorded and of the law, it is now ordered and adjudged that there be judgment in favor of the defendant, and that his title to the land in controversy in this cause, and described in the pleadings, be adjudged good and valid as against the plaintiffs herein. See minutes 2d Feb'y, 1856.

Order Amending Judgment.

Minutes.—November Term, A. D. 1855.

New Orleans, Saturday, 2d February, 1856.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

THE UNITED STATES
vs.
JAMES MCMASTERS. } 2,061.

Ordered by the court that the judgment herein entered be amended by striking therefrom all that portion which decrees costs against the United States, and that as so amended it be engrossed for signature.

Final Judgment.

Judgment Docket.

Circuit Court of the United States, fifth circuit and eastern district of Louisiana.

November Term, A. D. 1855.

New Orleans, Monday, 4th February, 1856.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

THE UNITED STATES
vs.
JAMES MCMASTERS. } 2,061.

By reason of the verdict of the jury herein rendered and recorded and of the law, it is now ordered and adjudged that there be judgment in favor of the defendant, and that his title to the land in controversy in this cause, and described in the pleadings, be adjudged good and valid as against the plaintiffs herein.

Judgment rendered 14th January, 1856.

Judgment signed 12th February, 1856.

(Signed) THEO. H. McCALEB,
U. S. Judge.

Petition for Writ of Error.—Filed 16th Nov'r, 1858.

Circuit Court of the United , eastern district of Louisiana.

THE UNITED STATES
vs.
JAMES MCMASTER & als. } 2,061.

To the Honorable the Circuit Court of the United States in and for the eastern district of Louisiana:

The petition of the United States of America with respect repre-

sents, that there is error to the prejudice of petitioner in the final judgment rendered in this case in favor of James McMaster and Richard A. Stewart, and that petitioner is aggrieved by said judgment.

Wherefore petitioner prays by their said attorney, Thos. J. Semmes, that a writ of error be allowed petitioners to the Supreme Court of the United States, returnable at the next term of said Supreme Court, and petitioner will ever pray, &c.

(Signed) THOS. J. SEMMES,
United States Att'y, East Dist. of La.

United States of America, Circuit Court of the United States, fifth circuit and eastern district of Louisiana.

CLERK'S OFFICE.

I, John W. Gurley, clerk of the circuit court of the United States, for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 75 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had in the case of the United States of America vs. James McMasters et el., No. 2,061 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this first day of December, A. D. 1858.

J. W. GURLEY,
Clerk.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States in and for the fifth circuit, and holding sessions for the eastern district of Louisina, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or one of you, between the United States of America and James McMasters, and Richard A. Stewart, a manifest error hath happened, to the great damage of the said United States of America, as by their complaint appears: we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and pro-

ceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this 19th of November, in the year of our Lord one thousand eight hundred and fifty-eight.

J. W. GURLEY,
Clerk of the United States Circuit Court
for Eastern District of Louisiana.

Citation in Error.

THE UNITED STATES OF AMERICA.

The President of the United States to James McMasters, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein the United States of America plaintiffs in error, and you et al. are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this 19th day of November, in the year of our Lord one thousand eight hundred and fifty-eight.

THEO. H. McCALEB,
U. S. Judge.

Marshal's Return.

Received November 20, 1858, and on the 23d November, 1858, after deligent search and inquiry, ascertained that the said defendant, James McMasters, resided out of this State; I thereupon tendered the said copy of the within citation to C. Legardeur, his attorney, who accepted service of the same, and now returned this into court, this November, 1858.

CHAS. CATOIR, *D'y M.*

Citation in Error.

THE UNITED STATES OF AMERICA.

The President of the United States to Richard A. Stewart, greeting:

You are hereby cited and admonished to be and appear at a Su-

preme Court of the United States, to be holden at the city of Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein the United States of America plaintiffs in error and you et al. are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this 19th day of November, in the year of our Lord one thousand eight hundred and fifty-eight.

THEO. H. McCALEB,
U. S. Judge.

Marshal's Return.

Received November 20th, 1858, and on same day served copy of the within citation in error upon R. A. Stewart, by handing the same to him at his domicil, in the parish of St. Bernard, about 12 miles from New Orleans, and returned this Nov. 22d, 1858.

CH. CATOIR, *D'y M.*

Addenda.

Translation of French portions of Doc. A.—(A No. 25. April 12th, 1833.—Notice of Claim—M. Guichard.)

March 23d, 1765.—Concession.

[Doc. A, page 2.] Charles Philip Aubry, Knight of the Royal and Military Order of St. Louis, Commandant of the King, in Louisiana, and Denis Nicolas Foucault, performing the functions of Ordinater in this Province:

On the application which (Sir) Jacob Corbin Bachemin, an ex-infantry officer, has made for the concession to him of a piece of land thirty arpents front, bordering on the river St. Louis or Mississippi, with the ordinary depth of forty arpents, starting from the limits of that of (Sir) Laloire, his father-in-law, and going down therefrom below and on the same side as this city, and considering the statement made in his application, and the certificate of Mr. Amelot, an engineer of this colony, all hereto annexed—

[Page 3d.] We have granted to him, and by these presents we do grant to him, of the said piece of land, twenty arpents only in front on the said river, starting from the said limit, with the ordinary depth of forty arpents, to the end that he and his heirs or assigns may enjoy and dispose of the same in full property and usufruct, as of a thing to them belonging, saving such titles or anterior possessions as may be contrary hereto, on the condition that

within one year from this date he shall thereon, from the establishment which he proposes to form; in default of which, after the expiration of said term, the said lands shall be reunited to the king's domain, and be disposed of as if the present concession had not been made; and subject to the charge of paying the seignorial rights, if any such should hereafter be established in this said province. We also reserve for his majesty all and every species of timber necessary for the construction of forts, magazines, and other works which have been or shall in future be ordered; likewise for the refitting and careening of his ships whenever it shall be necessary, as also the ground required for royal roads and fortifications. As to the air lines (aires de vent) which should limit the said twenty arpents front, they will be determined by stakes, which will be planted to this end, a process verbal whereof will be prepared and annexed to these presents, after they shall have been recorded in our register of grants.

Given at New Orleans, under the seal of our arms and the countersigns of our secretaries, the twenty-third of March, one thousand seven hundred and sixty-five.

(Signed) AUBRY & FOUCAULT.

Countersigned:

SOUBIE & DUVERGIE.

[Doc. A, page 4.] Translation from French of an "Extract from an Inventory of the Property, &c., left by Mrs. Charlotte Moran, wife of Magloire Guichard, &c., made on the 20th of July, 1810, by the Parish Judge of the Parish of New Orleans, assisted by the Deputy Register of Wills."

A piece of land of twelve arpents front, ten of which extend the ordinary depth, and the remaining two to the lake, bounded above by (the lands of) Mr. Jerome La Chapelle, and below by (those of) Mr. Phillipon, which land the said (Sir) Magloire Guichard declares (être en propre de face) to belong solely to his deceased wife, by virtue of an abandonment to her by her father, the deceased Chevalier Moran, in full satisfaction (pour la remplier) of her rights in the succession of her mother; and this in conformity to the contract which was passed at this time between the deceased (Sir) Jean Landier, first husband of the said (lady) Charlotte Moran, and the Chevalier Moran, deceased, and the title whereof may be found in the office of Narcisse Brontin, notary public, at New Orleans—the said land, together with its enclosures and the buildings erected thereon, being valued at the sum of eighteen thousand dollars.

Sept. 24th, 1812. Vente D'habitation.—M. Debergne to M. Guichard.—Sale of Plantation.

Before Mr. Michel de Armas, notary public, residing in New Orleans, State of Louisiana, United States of America, and in pre-

sence of the witnesses hereinafter named and subscribed, appeared (Sir) Michel Debergne, a land owner, domiciled in this city, who has, by these presents, sold, delivered, and made over, henceforwards and forever, with the promise to warrant against all troubles, gifts, debts, mortgages, evictions, alienations, donations, and against any and every other obstacle whatever in general, to Sir Magloire Guichard, a resident of this parish, now here present and accepting the same, as purchaser for himself, his heirs and assigns, a plantation situated three leagues below this city and on the same bank, measuring twelve arpents front, with the ordinary depth of forty arpents, excepting one part thereof, which extends back to the lake, as and such as it was adjudged to Mrs. Landier, deceased, by the order and authority of the auditor of war under the Spanish government, on the twenty-sixth day of November, eighteen hundred and two, the said plantation bordering above on that of (Sir) Celestin La Chapelle, (cidevant Liben,) and below on that of (Sir) Phillippon, (cidevant Vivière,) together with the houses, buildings, and other establishments, which were on the said plantation at the time of the said adjudication of twenty-sixth of September, one thousand eight hundred and ten; and also twenty head of slaves, instead of twenty-one, as stated in the inventory, considering that the negro named Hazard died before the said adjudication, the twenty slaves being hereinafter named as follows, to wit: Joseph, a creole negro; Commandeur, forty-four years of age; Louis, a negro, about forty years of age; old Francis, a negro, between sixty-five and seventy years of age; Mars, a negro, about sixty years old; Celestin, a negro, about thirty-five years old; Alexis, twenty-seven years old; Augustine, a negro, twenty-eight years old; Congo, a negro, twenty-seven years old; Francis, a negro, about twenty-five years old; Lucien, a negro, about twenty years old; Rose, a negress, about sixty-five years of age; Marinette, a negress, about fifty years of age; Manette, a negress, about twenty-three years of age; Pimba and her infant, forty years of age; Margaret, a negress, forty years of age; Sophia, five years of age; Agorine, nine years of age, and Nalsain, an infirm mulatto, nine years of age; and, in fine, all the movable furniture, effects, and kitchen utensils, tools, agricultural implements, cattle and animals described in the said inventory, deposited in the office of the clerk of the probate court in this city, and a certified copy of which has been, in the presence and within sight of the undersigned notaries and witnesses, handed over by the (sir) vendor to the (sir) purchaser, who takes cognizance and acknowledges receipt of the same, as also of everything sold above, as hereinbefore detailed and set forth, without exception or reservation, which plantations, slaves, animals and other effects belong to the (sir) vendor, by an adjudication to him at the auction sale made by Messrs. Dutillet and Peyrellade, public auctioneers in this city, on the twenty-first of July, seventeen hundred and ten, of the effects abandoned

by the lady Charlotte Moran, wife of (Sir) Magloire Guichard, an inventory whereof was made.

The present sale is made for and in consideration of the sum of thirty thousand dollars, which the vendor acknowledges to have received in cash heretofore, and out of the presence of the undersigned notary and witnesses, in current specie money, for the benefit of which (purchaser) he grants a good and valid release, renouncing in this respect all advantage of the law, non numerata pecunia, and others relating thereto; by means of which the vendor places and subrogates the purchaser in all the rights of property which he has and can have over the property now sold, releasing it for his benefit, desiring that he be seized and put in possession thereof by whom and in the manner it may be proper, constituting as his attorney the bearer of a letter, (expedition,) giving him all powers therein for thus, &c., promising, obligating, renouncing, &c.

Thus done and passed at New Orleans, in my office, the twenty-first of September, eighteen hundred and twelve, in presence of Messrs. Felix de Armas and Michel J. B. Fourcisy, witnesses competent, and dwelling in this city, who, together with the appearers, have signed this act after reading of the same.

(Signed) MAG'RE GUICHARD,
M. DUBERGNE,
FELIX DE ARMAS.
FRANCIS and MICHEL DE ARMAS,
Not. Pub.

A correct copy from the record, in the possession of Mr. Felix de Armas, the undersigned notary, immediate successor of the said Michel de Armas, deceased.

New Orleans, the 11th February, 1831.

(Signed) FELIX DE ARMAS, [SEAL.]
Not. Pub.

Correct translation.

(Signed) ROB'T M. LUSHER,
Interpreter Dist. Court U. S.

N. O., Nov. 15, 1854.

Circuit Court of the United States, fifth circuit and eastern district of Louisiana.

CLERK'S OFFICE.

I certify that the foregoing six pages contain full, true, and correct copies of the original translations made by R. M. Lusher, interpreter of the United States district court for the district aforesaid, of all that portion of Exhibit B, filed with the answer of R. A. Stewart, on the 9th November, 1854, in the case of the United States vs. James McMasters and al., No. 2,061 of the docket,

which is contained on pages 22, 23, 24, 25, 26 of the foregoing transcript of the record of the said cause.

Witness my hand and the seal of the said court, at New Orleans, this 18th July, A. D. 1859.

[L. S.]

J. W. GURLEY, *Clerk.*

Filed 11th December, 1858.

Supreme Court of the United States.

THE UNITED STATES, PLAINTIFFS IN ERROR,

VERSUS

JAMES McMASTERS AND RICHARD A STEWART, IN ERROR TO THE CIRCUIT COURT OF THE EASTERN DISTRICT OF LOUISIANA.

BRIEF FOR DEFENDANTS IN ERROR.

Commercial Bulletin print., 114 Poydras and 35 Front Levee streets.

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Supreme Court of the United States.

THE UNITED STATES, PLAINTIFFS IN ERROR,

VERSUS

JAMES McMASTERS AND RICHARD A. STEWART, IN ERROR TO THE CIRCUIT COURT OF THE EASTERN DISTRICT OF LOUISIANA.

BRIEF FOR DEFENDANTS IN ERROR.

In this case the United States claim to recover from the defendant in error a tract of land, which forms part of a larger tract held and possessed by him as a sugar plantation in the parish of St. Bernard and State of Louisiana.

The decision of this case turns upon a bill of exceptions found on p. 24 of the record. But, in order to judge of the appositness and legality of the evidence objected to, it is necessary to present a distinct view of the objects inquired into.

The brothers Philippon, the former proprietors and vendors of this plantation, filed on the 20th of December, 1832, in the Land Office at New Orleans, a notice

and evidence for the confirmation of this title under the Act of Congress of July 4, 1832 (p. 16). With this notice they filed a plan showing the boundaries of the land claimed by them (see plan opposite to page 16). This survey was executed by Aug. S. Phelps, U. S. Dep. Surveyor, in February, 1831 (17).

Upon this claim, the New Orleans Land Commissioners reported "that this claim ought to be confirmed," and this report was approved by an act of Congress of March 3, 1835, (p. 18). The survey of Phelps was made under a contract with the United States Government, and agreeably to official instructions, and was duly approved and examined by the competent authorities (see testimony of Phelps, p. 35, and plan B opposite page 50, with Surveyor General's certificate.)

The Philippon plantation was composed of eight different grants (see notice of claimants and surveyor's remarks thereon, p. 16, 17 and 18). Of these but two give rise to discussion in this case, to wit, the grant to Jacob Corbin Bachemin, of March 23, 1765, numbered 6 in the notice, (p. 17), and the grant to Maria Lecompte, dated November 3, 1784, and numbered 1 in the notice (17).

The grant to Bachemin, of the 23d of March, 1765, was for 20 arpents front on the Mississippi, by the ordinary depth of forty, bounded on the upper side by the plantation of Laloire, (15).

The grant to Mdme. Maria Lecompte was of the 3d of November, 1774, "for the vacant land lying in the

rear of the extremity of the forty arpents in depth of the plantation belonging to Bachemin, Corbin, and Portugais, and consists of the fourteen arpents in front, composing the said plantations, until it reaches Lake Borgne."

It appears from the certificate of the Surveyor General, (p. 9) that at the time of Phelps' surveys, the Laloire grant (the upper boundary of the Bachemin grant) belonged to Celestin Chiapella, and was designated as section 5 on the surveys. The Bachemin grant was represented as adjoining it, and formed sections Nos. 6 and 7, (see maps A and B, pp. 9 and 30).

The twenty arpents front granted to Bachemin could not be found on the ground. For after measuring fourteen arpents for Laloire's line down, this grant was met by a much older grant to Chamilly—of September 27, 1723—designated as section 8, on plan B. The Bachemin grant was therefore surveyed with a front of fourteen arpents, bounded above by the Laloire, and below by the Chamilly grant, the side lines being divergent. The grant to Maria Lecompte was surveyed as lying behind the Bachemin grant, between the continuation of the diverging side lines of the Bachemin grant, as far as Lake Borgne, as will appear by plan B.

Under these circumstances, the Attorney General of the United States contended that the fourteen arpents of the Bachemin grant should have been surveyed as running back for depth between parallel lines, adjoining and parallel to the Chamilly grant;

and that the Lecompte grant should have been surveyed as lying behind the Bachemin grant between the continuation of the same parallel lines. This claim is best understood by viewing the plan annexed to the petition. There a large triangle is exhibited, included between two lines, designated, one as "upper line, according to survey and possession," and the other as "upper line, according to the opinion of the Attorney General."

The matter to be determined under this issue, is whether the survey executed by the surveying department of the Government, or that proposed by the Attorney General is correct.

The defendants in error have their case made out by the special department of the Government, while not the least particle of evidence has been adduced to show that that survey is incorrect, or that such a one as is proposed in lieu thereof, ever was made or could have been made in a similar case. The defendants therefore certainly had a *prima facie* case, and might have rested there. But, as it was in their power to prove affirmatively the complete correctness of his survey, they did so, and produced the copious evidence of A. S. Phelps, the surveyor who had made the surveys, since approved by his superiors, (33).

This is the testimony that was excepted to by the District Attorney. The bill of exceptions says (33) "the answers of the witness are argumentative, and state, or pretend to state *laws and regulations* of the French and Spanish governments concerning sur-

veys." The witness was too well informed to say anything about said laws and regulations. He did not use these terms; he knew well that none such ever existed, and that no trace of any of them is to be found in any office in the United States.

All the witness had to guide him, was his ample experience. He says (32): "I have re-surveyed more than a thousand tracts of land, the titles of which were derived from French and Spanish grants, and (34) I have examined many hundreds of all the papers connected with the French and Spanish grants, being original documents." The District Attorney (p. 24) would have us produce all the thousands of documents from which the witness formed his conclusions—a proposition not to be discussed. Carried thus far, it would exclude in all cases the examination of experts, and would compel courts and juries to study professional matters in the same sources in which the expert spent his life to acquire his special knowledge. The peculiar position of the parties in this case should not be lost sight of. The representative of the United States has it in his power, by means of the local, and still more, by means of the general Land Office, to show what rules are universally acknowledged in such matters. When, therefore, Phelps says that in no instance in lower Louisiana the magnetic direction of the side lines was indicated in the terms of colonial grants; that the front and depth and adjoining boundaries alone were indicated, and that when a grant was described as bounded above by A and below by B, the

direction of its side lines followed those of the neighbors, and never left a triangle vacant between them on the water courses, these statements, if incorrect, could have been refuted by the production of plats of survey of those parts of Louisiana, where old grants most prevail, and generally occupy the entire front of the water courses.

The bill of exceptions objects to the statement of the witness, that he made the survey under instructions from the Surveyor General, south of Tennessee, and that his survey was approved by the competent authorities. This evidence is asserted to be secondary, and it is urged that the instructions and the approval by the competent authorities should have been produced.

The approval is shown by the certificate of the Surveyor General of the United States for the State of Louisiana, at the foot of the survey exhibited in plan B, opposite page 30. This officer succeeded the surveyor south of Tennessee in his duties, so far as they applied to the State of Louisiana. (See Act of Congress of March 3, 1831. 4 U. S. Stat. at Large, 492.)

It is well known that the "*instructions*" to a deputy surveyor here spoken of, are simply a contract to survey such or such a claim. Nothing is ever said to him concerning the manner of making the survey. When it is returned, it is examined; and, if made in conformity with the title papers and correct principles, it is approved. The approval is conclusive evidence that the survey was made under a contract. A volunteer

survey would not be paid for by the general Government—such a thing is not known in the land offices of the United States.

The bill of exceptions further objects to the statement of the witness, "that the survey was made" strictly in conformity with an original plan of survey by Don Louis Andry, an ancient colonial surveyor, in possession of and exhibited to me by the Messrs. "Philippon," and it is insisted that the original of this survey should be produced.

A very satisfactory answer can be made to this objection. There is no doubt that the grant to Maria Lecompte, of which the land claimed in this suit is a part, (see the plan annexed to the petition), was surveyed by Andry before the grant was made. The grant states so expressly, (19).

The witness says that the original plan by Don Louis Andry was exhibited to him by the Messrs. Philippon (36 and 37); that he was perfectly acquainted with Andry's surveys; that he surveyed both the Bachemin and the Lecompte grants in strict conformity with Andry's survey, (37), and that reference to this plan was made in his process-verbal of survey or field notes at the time, (36). Indeed, we find this reference in the field notes on pp. 17 and 30 of the record. On the ground he found an ancient boundary post, evidently made by an ancient colonial surveyor; and this is also mentioned in his field notes, (38).

It would evidently have been very desirable to produce Andry's original survey, but, notwithstanding the most diligent search in all places, where it might have been supposed to be, it could not be found. This is proved by the affidavits of the defendant Stewart, (21), of John Henderson, his counsel, (22), and of Felix Grima, the Counsel of the heirs of Philippon (23). These affidavits show most diligent and extensive search, although unattended by result, and opens the way for Phelps's testimony, who, in 1831, saw and examined this plan critically ; last saw it in Philippon's hands in 1838 or 1839, (39), and does not know what has become of it.

The singularity that the bill of exceptions charges evidence with imperfections which are refuted by the record, is perhaps explained by this other singularity, that the bill of exceptions was drawn up and signed two years and three months after the trial of the case, (24, 21).

"Though a usage is founded on the laws and edicts of the government of the country where it prevails, yet still it may be proved by parol." 2 Greenleaf, § 252.

"The strict rule, excluding hearsay evidence, is relaxed in matters of general interest. Evidence of common reputation is received in regard to public facts." 1 Greenleaf, §§ 127 and 128.

"A custom may be proved by hearsay evidence, if a foundation has been laid for its admission by the enjoyment of the right claimed." 1 Phil. Evid., 249.

The ancient occupation of the land under the boundaries always claimed by the defendants, and the existence of buildings of the defendant upon the land claimed by the Government, is fully shown by the testimony of Phelps, (38).

"Even the declarations of a deceased surveyor concerning boundaries are admissible in evidence." 2 Phil. Evid., 634.

The manner in which confirmed private claims are to be surveyed is clearly stated in a letter of the Commissioner of the General Land Office, dated September 25, 1826, and found on page 860 of the second volume of the "Laws, Opinions, Instructions," etc., relating to public lands, published in 1838 by the Government, of which the Court takes official notice. "Such surveys ought, however, not to be disturbed for trivial causes, particularly when they have been made for a length of time, the land occupied and the adjacent public surveys made in conformity to such re-surveys of the private claims; in all cases, in fact, where the old re-surveys substantially cover the land intended to be confirmed, a *trivial deviation in such surveys from the Spanish survey*, either as to course and distance, or as to quantity, should not be considered a sufficient ground for disapproval.

It seems, therefore, evident that the testimony excepted to was properly admitted, and that the writ of error should be dismissed."

LOUIS JANIN,
Of Counsel for Respondents.

In the Supreme Court of the United States.

DECEMBER TERM, 1866.

UNITED STATES
vs.
JAMES McMASTERS and
RICHARD A. STEWART.
} No. 3.

In error to the Circuit Court of U. S. for the Eastern District of Louisiana.

BRIEF OF UNITED STATES.

In the Supreme Court of the United States.

DECEMBER TERM, 1866.

THE UNITED STATES, plaintiffs in error, *vs.* JAMES McMASTERS and RICHARD A. STEWART. } No. 3.

In error to the Circuit Court of the United States for the Eastern District of Louisiana.

STATEMENT OF THE CASE.

This is a writ of error to a judgment rendered in the circuit court of the United States for the eastern district of Louisiana in a petitory action in the nature of an ejectment instituted in 1854 by the United States to try the title of a large tract of land in Louisiana, claimed adversely by the defendants in error under certain Spanish and French colonial grants.

It appears that in the parish of St. Bernard, about ten miles below the city of New Orleans, there have been, among others, the following grants, viz: French grant to François Galary, dit Chamilly, dated in 1723; French grant to J. Bpte. Leonard, dated in 1724; French grant to Sr. Marquis, dated in 1763; French grant to Jacob Corbin Bachemin, dated in 1765; Spanish grant to Don Henrique Desprez, dated in 1773; and a Spanish grant to Madame Maria Le Compte, dated in 1784. (Rec., p. 17, and exhibit B—map.) Under these grants the defendants claim.

The fact that all these grants were made is not in dispute, but, as will hereafter appear, the controversy arises upon the language employed by the colonial grantor to describe the land in the instrument of concession in the grants respectively of Bachemin and of Madame Le Compte. In the present state of the pleadings, the very intricate questions of boundary, which entered into the issue joined below, are not material; but the obscurity of the descriptive calls in the two grants last mentioned requiring elucidation to the jury, the defendants had recourse to parol testimony below, to the admission of which the United States excepted, and the question, accordingly, is on the admissibility of certain evidence. The following particulars seem necessary to render the precise question intelligible:

1. *The Bachemin grant.* (Rec., p. 44.)—In the deed of concession (translation) it is recited that Bachemin applies for a grant of thirty arpents fronting on the Mississippi river, "starting from the limits of that of (Sir) Laloire, his father-in-law, and going down therefrom below," etc., and then it is said: "we do grant to him, of the said piece of land, twenty arpents only in front on said river, starting from the said limit, with the ordinary depth of forty arpents," etc. It will be observed that the front line is to be twenty arpents in length, and is to start from the limits of the grant, i. e., from the lower end of the front line of the grant, of his father-in-law, of which front line it is to be like a continuation. It is seen, also, that the "ordinary depth of forty arpents" is to be the *length* of the side lines of the Bachemin grant. But what *direction* these side lines were to take does not appear in the grant without elucidation. They might

be parallel to each other and perpendicular to the mean direction of the front line, (this following the river bank;) or they might be parallel to the side lines of Laloire and to each other, without reference to the direction of the front line; or they might diverge from each other if the front line was convex, or converge if it was concave, in either case, by being made perpendicular, not to a mean of the front line, but to the direction of that part of it which was in view at the point of departure; so that if the bend of the river, along which lay the front line, was convex, the line starting from the upper limits and the line starting twenty arpents below it would greatly diverge in reaching the common depth of forty arpents. As the language of the grant itself does not conclusively show its meaning on this point, extraneous evidence was deemed requisite to explain it.

It may be remarked here that, when located, only *fourteen* arpents front were in fact found vacant, as appears.

2. *The Le Compte grant.* (Rec., p. 19.)—The Bachemin grant above was broken into four tracts, Bachemin retaining one, at the date of the grant to Madame Le Compte, in which her tract is thus described: "Considering the foregoing proceedings made by the Segundo Ayudante of this place, Louis Audry, who was appointed to make the survey, and put Dn. Maria Le Compte in possession of the vacant land which lies in the rear or at the extremity of the forty arpents in depth of the plantation belonging to Bachemin, Corbin, Voisin, and Portugais, and consists of the fourteen arpents in front, composing the said plantations until it reaches Lake Borgne," etc. * * "we do * * grant the above-mentioned fourteen ar-

pents front, from the forty arpents in depth, owned by the said Bachemin," etc., "to the aforesaid lake, following the same directions which the boundary lines of the said Bachemin," etc., "run, in order that" etc.

It would seem from the above that a survey of Madame LeCompte's grant had been made by "Louis Audry," the official surveyor of the colony. No such survey was produced.

Without explanation, the descriptive terms in this grant are obscure. The land is in the rear and at the extremity of the Bachemin grant. It "consists of the fourteen arpents in front composing the said plantations until it reaches Lake Borgne." This might mean "a strip extending from the rear line of Bachemin to Lake Borgne as wide as the *front width* of Bachemin's grant, which is fourteen arpents;" or the words "fourteen arpents in front composing said plantations" may be descriptive, as far as they go, of their area as a whole; and the passage then might mean "a strip extending," etc., "as wide as the *rear width* of that grant, which is in the name of Bachemin, and which has fourteen arpents front." This construction would seem awkward but for the subsequent words, "to the aforesaid lake, following the same directions which the boundary lines of the said Bachemin, etc., run." What "boundary lines" are here referred to? Are the *side* boundaries included; and, if so, are they the side boundaries as claimed by Bachemin and his grantees at the time, or as they were contemplated in the original deed of concession to Bachemin? If the former seem to be the sense, again arises a further obscurity, in the express words, "we do grant *the above-mentioned fourteen arpents front from the forty arpents in depth* owned by," etc.; which would seem

distinctly to limit the strip from end to end to fourteen arpents in width, and to a length beginning forty arpents back from the river, at the extremity of Bachemin's tract, and ending at Lake Borgne.

This width, both for the Bachemin and the Le Compte grants, was believed to be correct by the plaintiffs, and that the large tract in addition claimed under the opposite construction of the colonial grants, was public land. Hence this suit.

Standing alone, the meaning of these grants is latent, and the testimony advanced by the defendants for the purpose of educing it we believe to be inadmissible.

QUESTIONS RAISED BY THE BILL OF EXCEPTIONS.

1. The defendants offered the deposition of Augustus J. Phelps, a former deputy United States surveyor, familiar with the subject, for the purpose of proving points, of which the following is offered as a fair summary, from the record:

(*a*) That the colonial grants in Louisiana do not generally contain specifications and directions of the course of the side lines.

(*b*) That it was the uniform rule, custom, and practice of the French, the Spanish, and the American surveyors, where the grant omitted to specify calls and directions of the side or rear lines, to survey the side lines perpendicularly to the water boundary front as a base line.

(*c*) That this rule, custom, and practice was approved by each and all of these governments.

(*d*) That in the grant of Bachemin the diverging side lines, as claimed by the defendants, were originally so surveyed and established by the authority or by the surveyor of the Spanish government.

(*e*) That there was an official Spanish survey of the Bachemin grant, as well as of the Le Compte grant, by one Don Luis Audry, Spanish surveyor.

(*f*) What were the contents of the said surveys, respectively, and—

(*g*) That those contents were such substantially as would correspond with the claims of the defendants.

These points are gathered from the interrogatories on page 26 and following, and the answers thereto on page 33 and following, of the printed record. It was believed that evidence on these points should have come from other accessible sources, and that of Phelps was accordingly objected to as secondary, and some of it on the further ground of being hearsay and argumentative. The court below overruled the objections, as going to the effect rather than to the admissibility of the testimony. (Rec., pp. 24, *et seq.*)

2. A second question is raised in the argument of the defendants, viz: that if the court erred, such error worked the plaintiffs no injury, because the fact sought to be established by Phelps' testimony had been established by other evidence found in the record. The defendants define that fact to be that the Bachemin tract in front and the Le Compte tract in the rear were not, either of them, restricted to a parallelogram, but that they had continuously diverging side lines from the river to the lake; and they hold that this fact had been established by act of Congress. (Brief of adverse counsel, page 18.)

The defendants, at the trial, introduced affidavits to prove the loss of the alleged surveys of Don Luis Audry. (Rec., pp. 21 and following.)

The plaintiffs' bill of exceptions is printed on pp. 24 and following of the Record. In support of it we submit the following:

ARGUMENT.

I. The colonial land systems of France and Spain, respectively, including their methods of evidencing their grants, and of surveying, platting, defining, and locating them, are a recognized part of the jurisprudence of those nations. Even down to the clerical and business routine of their land offices, their usages are foreign law. (U. S. *v.* Wiggins, 14 Peters, 345.) This is a question of interpretation of instruments of writing issued by foreign governments. Even in the case of a mere regulation of trade, the regulation is presumed to be in writing, and cannot be proved by parol. (Seton *v.* Del. Ins. Co., 2 Washington C. C., 176; Consequa *v.* Willings, 1 Peters, C. C., 229.) *A fortiori*, a principle of law governing the construction of a royal grant of real estate must be presumed to be written law. Only unwritten law can be proved without the authentic law itself, except after proof of attempt and failure to procure it. (Consequa *v.* Willings, *supra;* Story Conf. Laws, § 640.) The points sought to be established by the testimony of Phelps are principles, rules, and customs of a character belonging to the written law or the juridical books of all nations. They should, therefore, have appeared by production of the laws or rules themselves, their authenticity to be established as a fact by appropriate evidence. (Mostyn *v.* Fabrigas, 1 Cowper, 174; Story, Conf. L., § 637; Brush *v.* Wilkins, 4 Johns. Ch. R., 520; U. S. *v.* Wiggins, 14 Peters, 345.)

2. But even if the principles in question are un-

written law, the testimony of Phelps was not the appropriate evidence. So much of it as expresses opinions, impressions, and deductions is of course inadmissible, unless he was called as an expert; and thus eliminated, his testimony was immaterial. If an expert, Phelps must have been such as a surveyor. But beyond the strict scope of his practical functions in the field, a surveyor is the same as a common witness. (Ellicot *v.* Pearl, 10 Peters, 412.) If the laws and customs of Spain touching this issue had been proved to be inaccessible to the defendants, and secondary evidence had become thereby allowable, it could consist of nothing lower than the testimony of witnesses learned in those laws. (Story Conf. L., § 642; Dougherty *v.* Snyder, 15 Sergt. & Rawle, 87; Brush *v.* Wilkins, 4 Johns. Ch. R., 520.) In this last case the court declares that if the witness had not been a professional jurist his testimony would have been insufficient. It is not pretended that Phelps had any knowledge of the laws but what he had incidentally acquired in the exercise of his calling as a land surveyor.

The most liberal case which we find is that of U. S. *v.* Wiggins, 14 Peters, 345. In that, parol evidence was allowed to support a copy of a concession of land by explaining the loss of the original. The explanation was of the business usage of the officials of the colony in the manner of issuing their title papers and keeping their land archives, and it was proved by the testimony of a person who had been their clerk. But this was the best evidence in the nature of the thing. It must have been allowed as original evidence. The routine of an office and the principles to ascertain the sense of a grant of land may both be foreign law, but could not be brought under the same rules of evidence.

Proof by witnesses that an instrument was a complete grant by the laws of Spain in relation to colonial lands, admitted below, was expressly overruled by this court in a Louisiana case, "Maison Rouge" case, U. S. *v.* Turner, 11 How., 663. If the points advanced in Phelps' testimony could at all be proved by parol, at least it must have been by the testimony of a Spanish or French colonial jurist, or some person who had acquired in official or professional life a comprehensive and practical knowledge of the laws as such.

3. Phelps' testimony, even if capable of competency, was not made competent to the jury as evidencing the material points therein, because the record does not show that the court treated it as evidence of the laws, regulations, customs, and practices of the colonial government, and the jury cannot receive evidence of foreign law without the qualifying assistance of the court. (Story Conf. L., § 638; Consequa *v.* Willings, 1 Peters' C. C., 229; Mostyn *v.* Fabrigas, Lord Mansfield, 1 Cowper, 174.) If Phelps' testimony does not go to the laws in question it is inadmissible for immateriality. If it does, it is inadmissible as evidence of foreign law addressed to the jury without having been first addressed to the court. In Louisiana, as to the very laws in question, not only their existence, but even their effect is a question of law for the court. ("Maison Rouge" case, *supra.*)

4. The testimony of Phelps is clearly of the kind which imports that better evidence is behind and is withheld by the party as unfavorable to his interests. This elementary principle of evidence was carried much further than what we now maintain in this court by Chief Justice Marshall, in Church *v.* Hubbart, 2

Cranch, 237, *et seq.* In that case the proper formalities for authenticating a foreign law were wanting. Other evidence was offered, but the bare presumption that better was attainable, prevailed; moreover, it was said that adequate evidence was already in the record on writ of error to support the judgment below, but the court said that even if that were so the cause must be remanded. (*Ibid*, 239.)

Thus we come to the opinion, if the testimony of Phelps goes to show what were the rules, regulations, and practices of the colonial land officers and authorities, and if such rules, regulations, and practices were foreign law applicable to the interpretation of a grant of land, that said testimony was inadmissible, because (1) the thing proved was presumptively written law; or, if unwritten, (2) then because it ought to have been proved by witnesses of juridical learning and experience; or if, notwithstanding, Phelps was a competent witness, then (3) because it had not first been qualified for its purpose by the court. But there is another ground for the exclusion of this evidence, which we subjoin:

5. The laws, regulations, customs, usages, and practices, legislative, judicial, and administrative, of Spain and France, so far as they are concerned, by land grants from those nations lying within our present territory, and especially those in Louisiana, have become a part of American law, and preclude all parol testimony to their existence as facts. This court, in the "Maison Rouge" case cited above, in rejecting parol evidence of the meaning of a deed of concession, say that the "Spanish laws which formerly prevailed in Louisiana, and upon which the titles to land in that State depend, must be judicially noticed

and expounded by the court, like the laws affecting titles to real property in any other State. They are questions of law, and not of fact, and are always so regarded and treated in Louisiana." (U. S. *v.* Turner, 11 How., 663.) At least this must be so in Louisiana, whence this suit comes. And if this doctrine be subject to any qualification in this case, it cannot be with respect to so much of foreign law as has been promulgated by the government for application to cases of this class. (Story Confl. L., § 640; Talbot *v.* Seeman, 1 Cranch, 38.) Congress has from time to time published a multitude of documents for the sake of making known to the public the very laws and principles in question, in the form of official reports of land commissions, leading cases of private land claims, etc. In 1828 a regular compilation of them was ordered to be, and subsequently, by Joseph M. White, esq., was made. The same author, in a larger work, professes to cover the whole subject: "White's New Recopilacion," in two volumes, entitled "A new collection of laws, charters, and local ordinances of the governments of Great Britain, France, and Spain, relating to the concessions of land in their respective colonies." This has become a text-book. In the several authorized collections of the United States land laws; in the official work entitled "Laws, Instructions, and Opinions relating to the Public Lands," and in a score or more of highly accredited works, all extant, are to be found all the laws, regulations, rules, customs, usages, and practices of the Spanish and French in these colonies which could be applicable to the question of interpreting a grant of land. These books are law books in Louisiana. They are a part of the law of real estate there. They are judicially taken notice of

without proof. ("Maison Rouge" case, *supra*.) At least this must be so as to the large mass of colonial foreign law and custom which has been promulgated as such by the executive and legislative departments of our own governments, in the compilations referred to, and in the multitude of forms in which administrative recognition of them has been sanctioned by Congress, both in all the laws made under the treaties of cession, which devolve upon the executive the duty of knowing these foreign practices, and in all the confirmatory legislation on the subject. (Story Conf. L., § 640.)

If this court was right in the "Maison Rouge" case above, (11 How., 663,) it follows that the points covered by Phelps' answers are substantially questions of law. If this is so, of course the testimony of witnesses, even of those learned in the law, was wholly inadmissible to ascertain the sense of these instruments of grant. It cannot come under any of the exceptions which allow parol evidence to explain a deed, for, from the nature of things, Phelps could know nothing to the point but the law, already known to the court.

QUESTION RAISED IN ARGUMENT.

II. It is not accurate to say that the fact sought to be proved by Phelps' testimony was, that the Bachemin tract in front and the Le Compte tract in the rear were not restricted to a parallelogram, but had continuously diverging side lines, etc., and consequently, if there was error, that it worked the plaintiffs no injury; because the side lines might have been continuously divergent and the respective tracts might *not* have been parallelograms; and yet the testimony of Phelps to that much would have been immaterial,

for the defendants claimed not only that the tracts were not parallelogram in form, and had continually diverging side lines, but that the divergency was of a certain degree, and that the area was of a specific shape and size, and the facts adduced by the testimony of Phelps were to these certain and specific points themselves, and not to an abstract characterization of their effect, which would have been immaterial.

2. But the act of Congress referred to by the defendants does not establish the fact that there was a divergency in the side lines of these grants, or that they were not restricted to a parallelogram. The act appears to go to the validity of the grant as made, leaving its precise boundaries to be ascertained by a fair construction of its terms, in the light of Spanish and French land law and regulation. The act did not construe those terms.

In support of this position, we cite so much of the act as concerns the case, together with the record on which it was founded.

The application for confirmation.

This was made by the Phillepons, grantors of the defendants.

"To the register of the Land Office and receiver of public moneys in and for the southeastern district of Louisiana, at New Orleans.

"The notice of claim of François Phillepon and Jean Antoine Phillepon represents that they are owners each for an undivided half of a certain tract of land (established as a sugar plantation) situate in the parish of St. Bernard, on the east bank of the river Mississippi, about ten miles below the city of New Orleans, measuring twenty-one arpents front by an irregular

depth extending to Lake Borgne, bounded on one side by the plantation of Mr. Guichard and on the other side (below) by the plantation of the widow Beauregard; the whole, according to a full and detailed plat thereof, executed by Mr. Augustus S. Phelps, U. S. deputy surveyor, in the month of February, 1831, herewith presented and prayed to be recorded.

"The said plantation is held by the present owner and claimants by virtue of regular conveyances, and is derived from the following original grants or concessions, made and completed by the French and Spanish governments while in possession of Louisiana, to wit:

"1. A grant made in due form by the Spanish government to Mad'e Maria Lecompte for all the land in the rear of the fourteen arpents front by forty arpents in depth, owned by the heirs of J. C. Bachemin, to Lake Borgne, dated 3 November, 1784.

"2. A grant bearing date 28 January, 1763, made by the French government to S. Marquis, of all the land in the rear of nine arpens front by forty arpens deep, owned at that time by himself, to Lake Borgne.

"3. A grant made by the Spanish government to Dr. Henrique Daspres, dated 22 Sept., 1773, for all the land in the rear of eight arpens front by forty arpens in depth, owned by Mad'e Maria Lecompte, to Lake Borgne.

"4. A grant by the French government to Jn. B'te Leonard, bearing date January 3, 1724, of eight arpens front on the Mississippi by 40 arpens in depth.

"5. A grant by the French government to François Galardit Chamilly, dated Sept. 27, 1723, of nine arpens front on the river Mississippi by 40 arpens in depth, and—

"6. A grant by the French government to Jacob Corbin Bachemin, bearing date 23d of March, 1765, of 30 arpens front by 40 arpens in depth.

"Wherefore these claimants pray, the premises considered, that such of the documents presented by them in support of their said claim as may be deemed sufficient, may be duly recorded, and that a favorable report may be made on the said claim, as provided by the act now in force for the final adjustment of land claims in this district, approved 4 July, 1832.

"NEW ORLEANS, 20 *December*, 1832.

("Signed) JOHN A. MERLE,
"*For claimants.*

"See plat of survey hereto attached." (Rec. pp. 15 and following.)

Action of the Register and Receiver upon this application.

[Extract from their report.]

"A No. 7.

"François Phillepon and Jean Antoine Phillepon claim a tract of land, situate in the parish of St. Bernard, on the east bank of the river Mississippi, and about ten miles below the city of New Orleans, containing twenty-one arpens front by an irregular depth, extending to Lake Borgne, and bounded above by the land of Mr. Guichard and below by the land of widow Beauregard.

"The said tract of land is made of several tracts, all of which are derived from the original grants made and completed in due form, as follows, to wit:

[Here follow the several grants, substantially as above in the application.]

"Under all of which grantees the said claimants hold by virtue of regular conveyances. We are therefore of opininon that this claim ought to be confirmed." (Rec., p. 18.)

Upon the whole report, of which so much as concerns this case is quoted last above, the Secretary of the Treasury, in submitting it to Congress, remarks the absence of the *evidence* which the statute had required to be submitted with the report. His communication and the other documents may be found in the publications of the 1st session 23d Congress, Doc. No. 73, January, 1834. The Commissioner of the General Land Office, in his letter accompanying the report, also specifies several claims which he thinks ought not to be confirmed, on the ground that they had "no specific depth in arpents mentioned nor any extent in superficies." Among these is the Guichard claim (designated No. 25 in the report, class A,) the line of which is one of the boundaries of the Phillepon claim, as above quoted from the report. There is nothing in the report or in the record of this cause to show what are the legal bounds of the widow Beauregard's claim.

The presumption is therefore fair that when Congress acted on the Phillepon claim no evidence was before that body of the metes and bounds, area in form or extent, or, in a word, of the definitive location of the claim, beyond the report referred to and cognate remarks of the Secretary and the Commissioner. And what do these show? It is obvious that the description "land situate in the parish of St. Bernard, on the east bank of the river Mississippi, and about ten miles below the city of New Orleans, containing twenty-one arpents front by an irregular depth, extend-

ing to Lake Borgne, and bounded above by land of Mr. Guichard and below by land of widow Beauregard," with the absence of any knowledge whatever of Mrs. Beauregard's tract, and with knowledge from the same report that Mr. Guichard's boundaries were uncertain, was precisely the information and the only information of the specific boundary lines of the Phillepon tract which was before the legislature; and it is immediately obvious that no tract of land could be definitely located by such a description. Under these circumstances, the act of Congress approved March 3, 1835, was passed, from which we extract the confirmatory words:

"That the claims for lands within the southeastern district of the state of Louisiana, described by the register and receiver of the said district, in their report to the Secretary of the Treasury, bearing date the fifth of September, eighteen hundred and thirty-three, at New Orleans, be, and the same are hereby, confirmed against any claim on the part of the United States, except" etc. (4 Stat. at Large, 779, 780.) Among these exceptions, designated as No. 25, is the Guichard claim, objected to by the Commissioner for obscurity of boundaries as above.

3. Under this confirmation the General Land Office has never felt authorized to issue a patent for the lands in dispute herein, for the want, we may assume, of certainty of location.

We submit, upon this point, that the confirmation above confirms the right of the parties, as against the United States, to the land actually granted them, what lands so granted to be ascertained from the calls of the deeds of concession; and, consequently, that if there was error in admitting the testimony of

Phelps, it works injury to the plaintiffs, since the fact sought to be proved by it was that the definite location of the grants was as claimed by the defendants, a fact that is not established by other evidence found in the record, the evidence so erroneously construed going only to the fact that the grants are valid within the limits prescribed therein, and not that such limits are the same as the defendants claim.

4. If it be assumed that the instruments of concession in this case are so vague and indefinite as to require elucidation, that the grantor's rules of interpretation are the proper resource for the purpose, and that they are law which could not be proved by an expert surveyor, then this court has emphatically settled not only that parol evidence is not admissible, but that a confirmatory act of Congress, operating on such an instrument, ought not to be held to go further than to the validity of the grant; for this must be so if, as the court say, the vagueness and indefiniteness of a grant operates to prevent any particular parcel of it from becoming private property that may be maintained in a court of justice. The decision here referred to was reviewed, but the part of it which follows was not altered. We cite the case of U. S. *v.* King, 3 How, 786, 787. The court say: "It has not the aid of any authentic survey to ascertain and fix the limits of the land and determine its location. The instruments themselves contain no lines or boundaries whereby any definite and specific parcel of land was severed from the public domain; and it has been settled by repeated decisions in this court, and in cases, too, where the instrument contained clear words of grant, that if a description was vague and indefinite, as in the case before us, and there was no official survey to give it a

certain location, it could create no right of private property in any particular parcel of land which could be maintained in a court of justice. It was so held in the cases reported in 15 Peters, 184, 215, 275, 319, and in 16 Peters, 159, 160. After such repeated decisions upon the subject, all affirming the same doctrine, the question cannot be considered an open one in this court. Putting aside, therefore, and rejecting the certificate of Trudeau, for the reasons before stated, [this certificate was tantamount to Phelp's testimony,] the instruments in question, even if they could be construed as grants, conveyed no title to the Marquis de Maison Rouge for the land in question, and consequently the defendants in error can derive none from him."

If the principle has been settled by this court that a grant may be valid and yet indefinite in its location, by reason of obscurity in its descriptive calls, and if Congress had no other basis than what appears without Phelps' testimony, that body could not have intended to make any particular parcel of this land private property, maintainable as such in court, by the act of confirming the authenticity and validity of these instruments of concession. Upon the whole, we submit that the judgment should be reversed, and the cause remanded for a new trial.

HENRY STANBERY,
Attorney General.
J. HUBLEY ASHTON,
Asst. Attorney General.